

Missouri Attorney General's Opinions - 1943

Opinion	Date	Topic	Summary
1-43	Feb 26	CONSTITUTIONAL CONVENTION. NOMINATION OF DELEGATES.	Members of Senatorial Committee convened to nominate delegates for election as members of Constitutional Convention, may not count votes by proxy of any such member absent from such convention.
1-43	Dec 11	Hon. George Adams	WITHDRAWN
2-43	Apr 24	TAXATION. SALES TAX. EXEMPTION.	Construction of proposed amendment to the exemption section of House Bill 125, by Mr. Andrae.
2-43	Nov 8	COUNTY.	Stickers should be placed on ballots voted in bond election for airport.
3-43	Feb 26	CONSERVATION COMMISSION. LEGISLATION.	The authority of the Legislature under Section 16, Article 14 of the Constitution of the State of Missouri.
3-43	Apr 29	INSURANCE. PENAL DEPARTMENT. APPROPRIATIONS.	A five-year contract for insurance for the protection of penal institutions may be executed and payment made out of the biennial appropriation for 1943-1944.
3-43	Dec 18	MARRIAGES. CIRCUIT JUDGES.	Circuit Judges authorized to solemnize marriages any place in the State of Missouri.
4-43	Mar 11	Mr. Walter E. Bailey	WITHDRAWN
4-43	Mar 17	BANKS AND BANKING. SMALL LOAN LAW. LEGISLATIVE COMMITTEES.	Power and authority of Legislative Committees to compel the production of books and records of American Investment Company.
4-43	May 10	COUNTY TREASURER.	Must pay warrants in regular order of presentment even though judgment has been obtained on them.
4-43	Dec 29	COUNTY COURT.	Two members are sufficient to transact business.
5-43	Feb 16	APPROPRIATIONS.	Funds may be appropriated in 1943-44 biennium to cover costs of government in 1945, but total period covered may not exceed two years from passage of appropriations act.
7-43	Mar 5	SCHOOLS. ELECTIONS.	(1) School boards in common school districts cannot set up two voting places for the election of county superintendent; (2) School boards in city, town and consolidated districts may designate more than one voting place; (3) Counties are not required to provide ballots for

			election of county superintendent; (4) No special kind of ballot is required, and no one is charged specifically with the duty of furnishing ballots; and (5) School boards should provide blank ballots for use of the voters.
7-43	Apr 23	CORPORATIONS.	Under House Bill 309 certificate of shares of stock may be indorsed in blank.
8-43	Mar 30	COUNTY JUDGE.	Can Presiding Judge of the County Court act for the county in selecting, for county depository, and lending agent on county warrants, a bank in which he is cashier, director and stockholder?
9-43	July 26	Miss Dollie Blake	WITHDRAWN
9-43	Aug 18	COUNTY CLERK. COUNTY OFFICERS.	County clerk has duty of performing ministerial acts in the management of county school fund mortgages.
9-43	Aug 24	MUNICIPAL CORPORATIONS. TAXES.	Special tax bills against county for street improvements.
10-43	Apr 20	PROBATE COURTS.	Instructions to jury should not be given by probate judge.
10-43	July 24	COUNTY COURT.	Court, in its discretion, may allow fee to sheriff, involving use of an ambulance in transporting insane county patient to state hospital.
11-43	Jan 6	OFFICERS. OATH OF OFFICE.	Oath of office to a member of the County Court may be administered in any state by any person authorized to administer oaths.
11-43	Jan 11	RECORDER OF DEEDS. CORPORATIONS.	Articles of agreement should be filed and not recorded in the office of the recorder of deeds.
11-43	Feb 18	GENERAL ASSEMBLY. STAMPS. EXPENSES.	General Assembly may furnish the members thereof stamps for official business.
12-43	Jan 21	Hon. Dwight H. Brown	WITHDRAWN
12-43	Jan 30	TAXATION. EXEMPTION.	Property held by county court for use and benefit of county school fund is exempt from taxation; if it is so held on the assessment date such property remains exempt even though title thereto passes to a non-exempt holder before the next assessment date.
12-43	Feb 13	CONSTITUTIONAL CONVENTION.	March sixth last date for filing certificates of nomination of delegates.
12-43	Mar 11	ELECTIONS.	Time for certifying Constitutional Convention nominees by the Secretary of State.
12-43	Aug 28	LAWS,	How to compute the number of legal voters necessary.

		CONSTRUCTION OF. INITIATIVE OR REFERENDUM PETITION.	
12-43	Aug 30	CONFEDERATE HOME-CARETAKER AND ASSISTANTS.	Board of Trustees of Confederate Home at Higginsville may employ caretaker and assistants.
12-43	Aug 31	LAWS.	Effective date of.
12-43	Oct 26	SHERIFFS.	Has authority to purchase supplies for county jail without County Court order, if budget is sufficient. County Court cannot arbitrarily refuse account because price exceeds a prior contract price for other county buildings.
12-43	Nov 19	SECRETARY OF STATE. PRIVATE DETECTIVE AGENCIES.	Cities of 200,000 to 400,000 must register with Secretary of State.
12-43	Nov 26	TOWNSHIP COLLECTORS.	Township collectors liable on official bonds for failure to comply with Sections 14,009, 14,010 and 14,011, R. S. Mo. 1939.
12-43	Dec 27	SECRETARY OF STATE. CIRCUIT CLERK'S BOND.	Secretary of State has no authority to return bond filed in accordance with statute.
13-43	Mar 9	EXTRADITION.	Information on felony filed directly in the criminal court is not a sufficient affidavit before a magistrate for extraditional purposes.
13-43	Mar 26	Hon. Bill Burke	WITHDRAWN
13-43	Mar 31	OFFICERS. ELECTIONS.	A county officer may serve as a city councilman if the two offices are not incompatible. If the candidate receiving the majority vote cannot qualify, there is no election and one receiving minority voted is not elected.
13-43	Mar 31	DELINQUENT JUVENILES.	Discretionary with court as to who executes commitment.
13-43	April 23	COUNTY BUDGET.	Failure to include county health officer's salary in budget does not relieve the county of the obligation.
13-43	May 6	CITIES OF THE THIRD CLASS.	Sinking funds cannot be invested in United States Bonds.
13-43	July 1	MARRIAGES.	Order of Circuit or Probate Court for issuance of a marriage license immediately should be followed by the Recorder of Deeds.
13-43	July 17	SHERIFFS AND CONSTABLES.	Sheriffs and Constables, within the jurisdiction of his (the Constable's) justice, may summarily seize gambling devices.

13-43	Aug 24	PROBATE JUDGE.	Not authorized to appoint a deputy judge.
13-43	Oct 28	TAXATION.	Ad valorem tax of merchant who ceases doing business before first Monday in June; on merchants who commence doing business after first Monday in June.
13-43	Dec 2	CRIMINAL COSTS. PAROLEE.	Taxed costs shall include meals, and be paid by parolee.
16-43	Mar 3	PROSECUTING ATTORNEY. OFFICERS.	A tenure of a holdover prosecutor ends when his successor, after election and after a commission is issued, takes the oath of office.
17-43	Feb 26	Hon. Jonathan Edwards Clarke	WITHDRAWN
17-43	Apr 22	OFFICERS.	A committeeman may not qualify as Constitutional Convention delegate.
17-43	May 14	ASSESSORS.	May be removed by county court for failure to perform duties and a successor appointed.
17-43	Aug 6	RECORDER OF DEEDS. RECORDING LEASES.	Lease of real estate should be recorded.
17-43	Sept 22	COUNTY ASSESSOR. TAXATION.	Trustee should furnish Assessor a list of property held as trustee. Liability in case of failure to do so.
18-43	Jan 9	CRIMINAL LAW.	Submissible case stated under Sections 9865 and 9868 R. S. Mo., 1939.
18-43	July 15	ROAD DISTRICTS.	Specials under Article 10, Chapter 46 R. S. Mo. 1939, may buy rock quarry, but cannot lease.
18-43	Sept 29	COUNTIES – ROAD OVERSEERS.	Mandatory that County Court appoint Road Overseers. Such appointment may be made any time.
18-43	Nov 2	SCHOOLS.	How cost of transporting Negro student to school is to be paid when it exceeds five dollars per month.
19-43	Feb 2	TAXATION. SUCCESSOR TRUSTEE.	In case of death, resignation or removal of trustee appointed under Jones-Munger Act, successor trustee takes trusteeship without any conveyance from original trustee and takes title to all properties acquired under authority of Section 11131, R. S. Mo. 1939.
19-43	Feb 17	WATER DISTRICTS.	Water districts formed under Article 12, Chapt. 79, R. S. 1939, do not have exclusive right to sell water in their territorial limits.
19-43	Apr 15	OFFICERS. ELECTIONS.	Present incumbents in townships hold over for another term when no election was held.
19-43	May 8	TOWNSHIPS.	Fair Labor Standards Act does not apply to employees of township or other political sub-division of the State.

19-43	July 6	COUNTY COLLECTOR.	All statutory requirements in sale of delinquent taxes must be complied with exactly as prescribed. A sale held in any other manner renders the transaction void.
19-43	Dec 10	COUNTY FARM BUREAUS. EXTENSION AGENT.	County Court must make appropriation to county farm organization, and extension agents must maintain office at county seat.
20-43	May 14	Mr. Lieu. Cunningham, Jr.	WITHDRAWN
20-43	May 25	ACCOUNTANTS. STATE BOARD OF ACCOUNTANCY.	Candidate for C.P.A. examination need not be in public practice.
20-43	June 28	INSANE PERSONS. COUNTIES.	State has no claim on estate of insane person sent to the institution by county court as a poor person.
20-43	Aug 5	CONFEDERATE HOME.	Present Board of Trustees continues in charge until effective date of Senate Bill No. 178; there being no appropriation to cover per diem of board members, none can be paid but they may draw mileage for attending meetings.
21-43	Jan 19	TAXATION. DELINQUENT TAXES. DRAINAGE DISTRICTS.	Lands acquired by drainage districts are not subject to taxation and the lien for delinquent taxes may not be enforced during the ownership of the lands by the drainage district.
21-43	Jan 25	COLLECTORS.	In Section 11056, R. S. Mo. 1939, the words "calendar week" mean a period from Sunday to Saturday, and the words "year immediately preceding his election or appointment" mean the twelve months preceding the election or appointment and not the last calendar year.
21-43	Mar 27	COUNTY OFFICERS.	County required to furnish necessary supplies for county officers if same has been contemplated in the budget.
21-43	Mar 30	ROADS AND BRIDGES.	Town board may vote by mail and may on subsequent appointments of commissioners declare their first, second and third choice.
21-43	July 12	COUNTY COLLECTOR.	Shall collect drainage district taxes.
21-43	Sept 1	VILLAGES. TAXATION.	Trustees may pass ordinances for the taxation of dance halls and pin-ball machines, but have no authority to tax juke boxes.
21-43	Dec 29	TAXATION.	Priority of tax liens, General County and State taxes in relation to general municipal tax liens.
22-43	Jan 11	TAXATION.	Limitation of taxes by county.
22-43	Sept 14	SCHOOLS. SECRETARY AND	Compensation of Secretary and Treasurer of Board.

		TREASURER. COMPENSATION.	
22-43	Nov 26	ELECTIONS. ABSENTEE VOTING.	Senate Bill No. 31 excuses nonregistration of persons in military or naval service voting absentee ballots. Registration laws apply to such persons not voting absentee.
23-43	Nov 18	BARBERS. LICENSING.	Right of board to waive penalty fees under Section 10132, R. S. Mo. 1939.
24-43	Jan 21	CIRCUIT CLERKS.	(1) Circuit Clerk of St. Louis County not entitled to fees in addition to his salary set by Section 13528, R. S. 1939. (2) Circuit clerks are entitled to retain fee for bar enrollment as provided by Supreme Court Rules.
24-43	Feb 17	GOVERNOR. EXTRADITION.	Present rendition warrant issued by the Governor is valid.
24-43	Apr 10	Hon. Elvin S. Douglas	WITHDRAWN
24-43	July 22	APPROPRIATION. BUDGET ALLOTMENT.	How amounts expended under six-month-bill is to be charged against biennium bill.
24-43	July 29	TAXATION.	Procedure for collectors in selling lands for delinquent taxes after the same have been offered at the third sale and no bid has been received therefor.
24-43	Aug 3	TAXATION. ESTATES.	Executors or administrators of estates are liable for taxes against estates if they do not pay same out of the assets of estate and if taxes are assessed against the estate, the executor, administrator and their sureties are liable under the bond of such taxes.
24-43	Nov 16	COUNTY SUPERINTENDENT OF PUBLIC SCHOOLS.	Qualifications for County Superintendent of Public Schools under Section 10609, R. S. Mo. 1939, shall be at least twenty-four years of age, a citizen of the county from which he is appointed, hold a state certificate authorizing him to teach in the public schools of Missouri.
24-43	Nov 18	STATE BUILDING COMMISSION. PURCHASING AGENT.	Employment of architects for remodeling eleemosynary and penal institutions under State Building Commission Act does not have to be approved by State Purchasing Agent.
24-43	Nov 20	PURCHASING DEPARTMENT. BONDS.	Bond required by certifying officer must clearly show the intention to cover duties prescribed by House Bill No. 500, 62nd General Assembly.
24-43	Dec 22	GOVERNOR. PUBLIC SERVICE COMMISSION VACANCIES.	1) Vacancies in Commission shall be filled by the governor for the unexpired term. 2) Governor must submit name of appointee for confirmation to the Senate at the next general assembly whether in regular or special session.
26-43	Jan 15	SCHOOLS.	School districts can pay out of school funds for apparatus and labor to

			furnish lunches to children attending school.
26-43	Feb 9	MUNICIPAL CORPORATIONS.	Mayor cannot vote to break tie-vote on a council committee or board of public works.
26-43	Apr 19	LABELING AND TAGGING.	All “commercial feeding stuffs” sold, offered or exposed for a sale, or disposed of in this state, shall be labelled and tagged in accordance with the provisions of Article 22, Chapter 102, R. S. Mo. 1939, and the Commissioner may only withdraw from sale such feeds as listed in Section 14329, R. S. Mo. 1939.
26-43	Aug 11	APPROPRIATIONS.	An Appropriation Act which fails to designate the fund from which it is payable should be paid out of the general revenue.
26-43	Aug 16	MARRIAGE LAW.	House Bill 20. Charging of fees by probated judges and circuit judges in connection with issuance of marriage license.
26-43	Sept 11	AGRICULTURE. EGG REGULATIONS.	Approved egg regulations.
26-43	Oct 18	SCHOOLS.	Dissolution of Consolidated District may become effective when all the provisions of Section 10472, R. S. Mo. 1939, have been complied with.
26-43	Nov 9	DEPARTMENT OF AGRICULTURE. STATE OF MISSOURI.	The word “premium” construed in Sec. 30A, House Bill #419, to include ribbon prizes, the cost of which shall be paid out of such appropriation, where such ribbons are awarded pursuant to the act.
27-43	Oct 12	ROAD DISTRICTS.	Statutory method for dissolution provided for each type of district, must be followed.
28-43	Apr 14	TAXATION. SALES TAX.	House Amendment No. 1 to House Bill 125 would subject all ultimate consumers of electrical current, steam heat, water and gas, to the provisions of the sales tax, except those which are exempt under Sections 11409 and 11453 of the Act.
28-43	Apr 14	TAXATION. SALES TAX.	Effect of House Amendment No. 2 to House Bill No. 125.
28-43	May 14	Mr. Ted Ferguson	WITHDRAWN
28-43	June 9	Miss Dorothy F. Fardon	WITHDRAWN
28-43	June 18	INSURANCE.	Three questions relating to the authority of the State to insure.
28-43	July 27	SUPERINTENDENT OF SCHOOLS.	Shall not engage in teaching or any other employment that interferes with the duties of his office.
28-43	July 29	SCHOOL FUND MORTGAGE.	Statute of Limitations will run against the county in a school fund mortgage after a period of twenty years has elapsed, but the obligation

			remains in force as against sureties.
28-43	Oct 12	PROBATION OFFICER.	Section 9708, R. S. Mo. 1939, repealed by implication.
28-43	Dec 8	COUNTY COURT. SCHOOLS.	Construction of Section 10384A relative to procedure in determining true value of property.
29-43	Feb 5	COUNTY COLLECTOR. COMMISSIONS.	County Collector should not deposit his commissions on taxes with taxes in the County Treasury.
29-43	Feb 16	INCOME TAX. DEFERMENT OF COLLECTION AND MAKING RETURNS.	Collection of income taxes and the necessity of filing return by members of the armed forces outside the United States if such person's ability to pay such tax is materially impaired or if he is not in a position to make a return by reason of such service.
29-43	Apr 3	CLERK OF CIRCUIT COURT.	Temporary military service does not vacate office.
29-43	July 23	TOWNSHIP.	Authority of Township Board to require an audit of road and bridge moneys for two years preceding April, 1943.
31-43	Apr 6	STATUTES. LEGISLATURE.	A law applying to counties of certain population and under is not a special law.
32-43	Aug 25	AGRICULTURE. COMMUNITY SALES - REGULATIONS.	Regulations authorized by Senate Bill 11, relating to Community Sales.
32-43	Aug 30	PROBATE JUDGES.	Compensation – Senate Bill No. 4.
33-43	Mar 31	STATE HIGHWAY PATROL.	Violation of a city ordinance is not a criminal offense.
33-43	June 14	INHERITANCE TAX. DEDUCTIONS.	Homestead and dower.
33-43	July 13	COUNTY COLLECTORS.	Monthly reports required; liability for failure to make.
33-43	Nov 9	OFFICERS. TOWNSHIP TRUSTEES.	The County Court and not the Township Board is authorized to fill vacancy in office of Township Trustee.
34-43	Feb 27	ELECTIONS. SHERIFFS.	No fees provided for services for proclamation or notice of election for Constitutional Convention delegates.
34-43	June 10	CRIMINAL COSTS.	Where property is taken from a dwelling house, valued at less than \$30.00, county pays the costs; and, if more than \$30.00, the State pays the costs.
35-43	Apr 20	TAXATION. EXEMPTION.	Property held by trustee by Jones-Munger delinquent tax sale is exempt from taxation.

35-43	June 16	TAXATION. SOLDIERS AND SAILORS. DELINQUENT TAXES.	Penalty and interest on delinquent taxes of persons in military service forgiven.
35-43	June 24	COUNTY COURT.	May not reduce interest on outstanding loans and may not change school fund mortgage by attaching "rider" to the mortgage.
35-43	July 27	SCHOOLS. BOARD OF DIRECTORS.	Shall purchase from building fund additional land required for proper sanitation of school house.
35-43	Dec 20	DRAINAGE DISTRICTS. ROADS AND BRIDGES.	Not responsible for upkeep of their bridges after expiration of charter; authorities whose duty it is to maintain road on which bridge is constructed by drainage district may repair and maintain such bridge.
36-43	Apr 23	CIRCUIT CLERK.	Fees for special recordings are nonaccountable.
37-43	Jan 5	LIEUTENANT GOVERNOR. SENATE.	Power of Lieutenant Governor to vote and debate in the Senate.
37-43	Jan 22	BANKS AND BANKING.	Interpretation of Sections 7952 and 8032, R. S. Mo. 1939, as amended, relative to the amount banks and trust companies may loan to individuals, partnerships, corporations and bodies politic.
37-43	Feb 16	BANKS AND BANKING. SMALL LOAN COMPANIES.	The secrecy section of the banking code does not apply to the annual reports required to be filed by Small Loan companies under Section 7885, R. S. Mo. 1939.
37-43	May 4	Hon. Leo J. Harned	WITHDRAWN
38-43	Jan 6	EMBALMING BOARD.	Board may consider application of an individual for re-examination, where his license has been revoked for cause. Signing in blank certificates of death and leaving them with undertaker who is not licensed embalmer, to be used by him, is cause for revocation of license.
38-43	Feb 12	SOLDIERS. STATE BOARD OF HEALTH.	Soldiers should not be charged for certified copies under certain conditions.
38-43	Apr 5	PROSECUTING ATTORNEY. SCHOOL LOANS.	Not entitled to fee for examination of abstract from person making application for school fund loan.
38-43	June 7	BOARD OF OPTOMETRY. POWERS.	Not authorized under certain conditions to subpoena optometrist who makes slanderous remarks.

38-43	July 1	EMBALMING BOARD.	Licensing nonresidents.
39-43	May 4	TAXATION. EXEMPTIONS.	Real estate to be exempt from taxes on account of being used for religious worship or for purposes purely charitable must be used exclusively for religious worship or for purposes purely charitable.
39-43	July 10	TAXATION. DEPUTY COUNTY COLLECTORS. TAX SALES.	Deputy county collectors in counties under township organization may conduct sales of delinquent lands for taxes.
39-43	July 15	MARRIAGE LAW.	“Good cause” to be determined in each instance from facts presented.
39-43	Aug 17	SCHOOLS.	School district receiving State aid may pay excess above \$3.00 allowed for transportation costs, out of incidental funds of the district.
39-43	Sept 27	LIQUOR. BONDS.	When supervisor may revoke license after cancellation of bond.
39-43	Sept 29	INTOXICATING LIQUOR. ELECTION.	Construing Section 4890, RSMo 1939.
40-43	Jan 14	COUNTY COURT.	Old county court may employ janitors whose terms extend into term of new county court; two members of the county court may make an order to transact business without the presence of the other member of the county court.
40-43	Apr 7	COUNTY OFFICERS SURETY BOND.	Consent and approval of County Court for surety bond should be secured in advance.
40-43	Apr 20	COUNTY COURTS. AIRPORTS.	County courts may appropriate funds for purchase and maintenance of airport in the county.
40-43	Apr 28	TAXATION. BOARD OF EQUALIZATION. ASSESSORS. OMITTED PROPERTY.	County assessor may not add personal property to assessment rolls after he has turned his books over to the county clerk. The county board of equalization may not put on the tax rolls omitted personal property for any year other than the assessment which was made on June 1 next before the session of said board.
41-43	Jan 12	COUNTY ASSESSOR’S COMPENSATION.	De jure officer entitled to compensation instead of de facto officer who performed assessor’s duties.
41-43	Jan 27	REAL ESTATE COMMISSION.	Licensed broker and licensed attorney may act in dual capacity.
41-43	Feb 4	CRIMINAL COSTS.	State cannot pay board bills in criminal cases until money has been advanced by county and paid the sheriff.
41-43	Feb 19	OFFICERS.	Where duties are performed by several persons during a year each

		PROBATE JUDGE OF JASPER COUNTY.	person is entitled to proportionate share of the annual compensation.
41-43	Mar 4	REAL ESTATE COMMISSION.	There is no authority for requiring the applicant to pay his 1942 fees before obtaining his 1943 license.
41-43	Mar 27	REAL ESTATE COMMISSION.	May revoke, or suspend, on indictment although cause is still pending.
41-43	Apr 24	REAL ESTATE COMMISSION.	Cannot demand money put in escrow on guaranteed first mortgages.
41-43	Apr 26	REAL ESTATE COMMISSION.	To collect commission licensee must have license at the time he was employed to sell real estate.
41-43	May 17	EFFECTIVE DATE. MARRIAGE LAWS.	House Bills 20 and 45.
41-43	May 26	REAL ESTATE COMMISSION.	Licensed real estate agent cannot pay unlicensed broker commissions to secure prospective customers for money loans secured by real estate.
41-43	June 7	REAL ESTATE COMMISSION.	Licensee may pay non-resident who regularly engages in the brokerage business.
41-43	June 10	REAL ESTATE COMMISSION.	Fees of unused license cannot be refunded; a person who holds himself out as a real estate dealer in this state must qualify and apply for a license.
41-43	Aug 5	REAL ESTATE COMMISSION.	No prohibition against broker paying directly or indirectly to borrower cost of making loan, under Sec. 15, p. 424 et seq., Laws of Mo., 1941.
41-43	Aug 14	OFFICERS.	Compensation of officers cannot be increased during their term of office.
41-43	Sept 20	PROBATE JUDGES.	Should collect fees under present law until House Committee Substitute for Senate Bill 4 becomes effective.
41-43	Nov 15	COUNTY COLLECTOR. TAXATION.	County not liable for erroneous publication of notice of tax sale.
41-43	Nov 18	MISSOURI REAL ESTATE COMMISSION ACT. AUCTIONEER.	Auctioneer not required to obtain license from Missouri Real Estate Commission to sell real estate at public sale.
42-43	Feb 17	CRIMINAL COSTS. CRIMINAL LAW.	Solvent convicted defendant in counties of the third class liable for board bill accruing while committed to jail by lawful authority as part of costs.
42-43	Mar 6	OFFICERS.	A County Treasurer who marries after being elected may sign her

			marital name to official documents.
43-43	Mar 29	RECORDER OF DEEDS AND RECORDS.	Recorded instruments once recorded cannot be changed on the same record.
43-43	Aug 16	CRIMINAL COSTS. COUNTY COURT.	County Court must pay criminal costs in all cases properly certified, though such costs are not included in county budget; county judge incurs no personal liability in signing warrant where two-thirds of court vote to pay warrant; persons suffering from communicable diseases may be prosecuted for violation of rules and regulations of State Board of Health.
44-43	Apr 28	SCHOOLS.	Missouri School for the Deaf cannot sell typewriters directly to the War Production Board.
44-43	Aug 16	SCHOOLS. DEAF AND DUMB SCHOOL.	Children under six years of age may not be admitted to the Missouri School for the Deaf.
44-43	Sept 4	SCHOOL FOR THE DEAF. ADMITTANCE OF CHILD UNDER 6 YEARS OF AGE.	Children under six years of age may be admitted to Blind and Deaf School if no school funds are used for their maintenance and education.
44-43	Oct 15	APPROPRIATIONS. ITEMIZING.	Salaries of skilled labor and technical services may be paid out of the appropriation for "Repairs and Replacements" or "Additions" if services for such skilled labor or technicians are used for repairs and replacements or additions.
45-43	Jan 21	COUNTY COURT.	Upon appointment of county superintendent of public welfare the appointment of a probate parole and truant officer is automatically suspended.
45-43	Feb 11	ROADS AND BRIDGES.	Town board cannot vote by mail in eight-mile road district, when not situated more than ten miles from county seat.
45-43	Feb 12	ELECTIONS.	Eight questions concerning the selection of delegates to the Constitutional Convention.
45-43	Feb 18	BUILDING AND LOAN. ELECTIONS.	Manner of electing Directors.
45-43	June 1	BUILDING AND LOAN.	Building and Loan Supervisor may under certain conditions request court to escheat certain funds to the State of Missouri.
45-43	July 14	BUILDING AND LOAN.	Not required to be custodian of records of liquidated building and loan associations.
46-43	Jan 8	OFFICERS.	Deputy Circuit Clerk is an officer and entitled to receive compensation

			while lawfully holding title to office.
46-43	Feb 2	ELEEMOSYNARY INSTITUTIONS.	Board of Managers may employ an “Executive Secretary” to work in central office at Jefferson City, Missouri, with reservations.
46-43	Feb 4	LOTTERIES. THEATRE.	A plan whereby persons in attendance at the movie having a chance to be selected to answer some question which may be propounded to them, and, if they answer the question correctly, they are awarded a prize and, if incorrectly, they are given passes to the theatre, is a lottery.
46-43	Feb 5	INSANE PERSONS.	Under the facts in this case patient in question belongs to the State of Missouri and not the State of Illinois.
46-43	Apr 7	SCHOOLS.	Persons under twenty years of age should be enumerated even though absent in the military or naval service of their country.
46-43	Apr 17	ELEEMOSYNARY INSTITUTIONS. STATE PURCHASING AGENT.	Boiler inspection insurance may be purchased by the State Purchasing Agent for Eleemosynary Institutions.
46-43	Apr 22	STATE ELEEMOSYNARY INSTITUTIONS. GUARDIAN AND CURATOR.	Superintendent of State Hospital not authorized to receive money and funds due inmate.
46-43	July 3	COUNTY CLERK.	Shall make the back tax book.
46-43	July 10	COUNTY HIGHWAY ENGINEER.	In counties of no less than 20,000 inhabitants or more than 50,000 inhabitants the county court cannot appoint the highway engineer by reason of Sec. 8660.
46-43	July 21	LOTTERY.	Scheme whereby right to call a relative in armed service is awarded to theater patron is a lottery.
46-43	July 29	WAGES (STATE EMPLOYEES).	Writ of sequestration, under H. B. 167, should be served on State Treasurer.
46-43	Dec 29	ELEEMOSYNARY INSTITUTIONS. BOARD OF MANAGERS OF STATE HOSPITAL #1.	State Sanatorium has no authority to assign warrants and open accounts for collection.
47-43	Apr 22	TOWNSHIP SCHOOL FUND.	No authority to invest in United States Bonds.
48-43	Jan 12	JUSTICES OF THE	The term of office for a justice of the peace in counties under township

		PEACE. TERM OF OFFICE. TOWNSHIP ORGANIZATION.	organization is two years.
48-43	Feb 4	INSANE PERSONS.	County may recover for money expended for insane indigent county patient in certain instances.
48-43	Mar 18	COUNTY HIGHWAY COMMISSION. DUTIES OF COUNTY COURT IN REGARD THERETO.	The provisions of the County Highway Commission Act are mandatory and it is the duty of the County Court to comply therewith.
48-43	Mar 30	SCHOOLS.	(1) Voter must vote for county superintendent of schools in the school district in which he resides; (2) Voter must reside in school district thirty days prior to the election in which he offers to vote.
48-43	Apr 1	COUNTIES.	Statute of limitations operates against the county.
48-43	Oct 12	SCHOOL DISTRICT.	May close school and transport pupils of the district to other schools. Funds in hands of Treasurer known as Teachers' Fund may not be invested in Defense Bonds.
51-43	Mar 9	BANKS. TRUST COMPANIES. BUILDING AND LOAN ASSOCIATIONS. SMALL LOAN COMPANIES. LOAN AND INVESTMENT COMPANIES. REGISTERED PAWNBROKERS.	Resume' of money lenders' activities under Missouri Statutes.
51-43	Nov 16	PROBATE JUDGE.	Fees received by Probate Judges for issuing order to Recorder to waive three (3) day waiting period between application and issuance of Marriage license, is an accountable fee. Probate Judge shall at the end of each month make and file with County Clerk, a report (a) of all fees collected for the month, (b) fees earned but not collected for month, except (1) fees collected for solemnization of marriages; (2) hearing and determining inheritance tax matters.
51-43	Dec 7	TOWNSHIP COLLECTORS. TOWNSHIP BOARD.	Township board and not county court is authorized to fill vacancies in office of township collector.

52-43	Feb 3	ESCHEATS.	Real Estate in this state, belonging to non-resident decedent who died intestate leaving no heirs at law, will escheat to the state of Missouri. Personal property in this state, belonging to non-resident decedent who dies intestate leaving no heirs at law, should be transferred to the administrator in the state of his domicile.
52-43	May 22	INCOME TAX.	Section 11375, R. S. Mo. 1939, prohibits the examination of income tax returns or records for the purpose of obtaining information in connection with the collection of sales tax.
53-43	Sept 11	TAXATION – SALES TAX.	Charges for use of skates at a skating rink are not subject to sales tax, but if charge is made to go on floor to skate, it is taxable.
54-43	May 8	MUNICIPALITIES.	May impose license tax on resident operators of motor vehicles or operators doing business within the city.
55-43	Jan 22	SCHOOLS. ELECTION OF COUNTY SUPERINTENDENT OF SCHOOLS.	Tally sheets and ballots for the election for county superintendent of schools.
55-43	Jan 22	SHERIFFS.	In a county of 18,000, the sheriff, and not the county pays the jailer.
56-43	Feb 17	OFFICERS. CIRCUIT CLERK.	Induction into the armed forces does not effect title or compensation.
56-43	Mar 10	SCHOOL.	House Bill 94 increasing qualifications of county superintendent does not apply to those elected at April 6, 1943, school election.
56-43	Apr 12	OFFICERS.	Recorder of Deeds should not send out signed and sealed marriage licenses to Justices of the Peace to be used as needed, but should issue them himself upon request.
56-43	May 28	SHERIFF. FEE.	In counties the size of Cole the sheriff is entitled to three dollars (\$3.00) per day while actually in attendance on the court. He may appoint, not to exceed three deputies for such. Deputies are entitled to three dollars (\$3.00) per day.
56-43	Sept 28	NEWSPAPER.	Failure to publish for four weeks will not disqualify a newspaper from being a legal publication under Sec. 14968, R. S. 1939.
56-43	Oct 1	CRIMINAL LAW – COSTS.	In criminal prosecutions instituted by Prosecuting Attorney, county is liable for costs even though Prosecuting Attorney does not file Information thereon.
57-43	Feb 9	SCHOOLS.	Expenses of inspecting property which is security on school loan cannot be paid out of capital school fund.
57-43	Mar 29	COUNTY COLLECTOR.	When County Collector entitled to credit for delinquent taxes.

		TAXATION.	
57-43	Apr 13	CRIMINAL LAW.	Giving a bad check under Section 4694 R. S. Missouri, 1939, without a false representation is not a violation of the law.
57-43	Apr 28	CRIMINAL LAW.	When money is not obtained on a “bad check” the drawer is not guilty of obtaining money under false pretenses.
57-43	May 10	SCHOOLS. MORTGAGES.	Sheriff is not authorized to sell bonds under school fund mortgages without certified copy of county court order made in conformity to Section 10387, R. S. 1939.
57-43	May 19	COUNTY COURT.	County school fund loan may be made on any real estate in county. County court without authority to loan money from this fund on land outside county.
57-43	June 24	CRIMINAL PROCEDURE.	On disqualification of a requested judge, the regular judge and not the requested judge shall request another judge.
57-43	July 14	INSANE PATIENT.	County court may require estate of indigent insane patient to pay hospital fees, when by reason of an inheritance, the court changes status of patient from “county” to “private pay” patient.
57-43	Aug 3	SOLDIERS. CRIMINAL LAW.	Right of Civil Authorities to try soldier for Civil offense in time of war.
57-43	Aug 25	CIRCUIT CLERK. RECORDER OF DEEDS. DEPUTIES.	A person over the age of seventeen years may act as deputy circuit clerk.
57-43	Oct 4	PROSECUTING ATTORNEYS.	Should not accept employment to appear for clients before County Court.
57-43	Oct 7	PROBATE JUDGES SALARY. COUNTY BUDGET.	Probate Judge’s Salary may be paid out of current Budget if there is a surplus, otherwise out of the 1944 revenue.
58-43	Jan 16	PROBATE JUDGES. LIMITATION ON COMPENSATION.	Probate Judges’ compensation limited to annual compensation of Circuit Judge for same county for judicial services.
58-43	June 2	GENERAL ASSEMBLY.	Mileage of members attending session.
60-43	Jan 21	PROSECUTING ATTORNEYS.	(1) Duties of prosecuting attorneys relative to the escheat statutes; (2) Officers not allowed additional compensation for the performance of official duties.
60-43	July 19	TAX SALE OF LAND FOR DELINQUENT TAXES.	Right to redeem—limitations.

60-43	Oct 27	TAXATION AND REVENUE.	County clerks duty to extend real estate taxes to the proper road and school districts; both real estate and personal property shall be placed on same list.
61-43	Mar 25	CRIMINAL COSTS.	Upon acquittal, even though an instruction on manslaughter is given on a murder in the second degree, the State is liable for the costs.
61-43	May 17	PROSECUTING ATTORNEY.	May be “fee attorney” for the Reconstruction Finance Corporation.
62-43	Jan 16	Hon. Roy D. Miller	WITHDRAWN
62-43	June 8	INSURANCE. FRATERNAL AND BENEFIT ASSOCIATIONS.	Location of principal office and executive offices.
62-43	June 18	MUNICIPALITIES. BOARD OF PUBLIC WORKS.	Retirement of bond issue.
62-43	July 2	Mr. Edwin W. Mills	WITHDRAWN
62-43	July 2	MUNICIPALITIES.	City of fourth class cannot annex a fire district until they have complied with Section 34 of the Fire District Act.
62-43	July 13	TAXATION. ADMINISTRATORS AND EXECUTORS. DISTRIBUTION OF ESTATES.	An executor or administrator may at his own peril distribute personal property of the estate without an order of the Probate Court and if such distribution is made before the tax-assessment date, then the estate is not subject to be taxed on the properties so distributed.
62-43	July 15	Hon. John E. Mills	WITHDRAWN
62-43	July 29	TAXATION, DELINQUENT.	Refunds for taxes derived from erroneous sales of delinquent lands should be paid out of the County Treasury.
62-43	Aug 26	Mr. J. W. Miller	WITHDRAWN
62-43	Sept 17	SCHOOLS.	Schools having average of less than fifteen pupils in attendance may be closed by Board of Directors, State Superintendent of Schools, or by temporary combination for educational purposes. Boards of district schools under superintendency of county superintendent of schools shall set up bus routes. Assignment of pupils to school most accessible is duty of county superintendent of schools.
62-43	Nov 10	COUNTY CLERK. COUNTY COURTS. STATUTES.	1) No authority to collect principal and interest on school fund loans—not liable on official bond for such funds inadvertently collected. 2) Have no authority to allow borrower and sureties to execute new bonds and mortgage for sole purpose of reducing interest rate. 3)

			Section 10386 Laws of Missouri 1943, procedural in character—applies to prior and subsequent school fund loans.
62-43	Dec 8	COUNTY CLERK.	It is the duty of the county clerk to add up the figures showing the amount of tax in the proper columns of an assessor's book, and the aggregate amount in each column shall be noted on each page.
63-43	Sept 14	Mr. William A. Moon	WITHDRAWN
64-43	Feb 2	Hon. Henry G. Morris	WITHDRAWN
64-43	Apr 12	CRIMINAL LAW. PAROLE.	One who has been previously convicted of a felony is not eligible to a parole under Section 4201 R. S. Missouri, 1939.
64-43	Apr 21	TAXATION.	In counties duties and fees of township collectors and assessors with respect to income tax returns filed during the term of office but on which no assessment was made prior to the expiration of their term.
64-43	May 11	SCHOOLS.	(1) Prosecuting attorney to prepare the papers necessary in the loaning of money from county school fund. (2) Duty of county clerk to see that such papers are properly recorded.
64-43	June 4	HOUSE BILL NO. 20.	Marriage license application is not required to be presented in person by applicants for licenses.
64-43	July 30	MARRIAGES.	Ceremony—where performed.
66-43	Feb 18	PROSECUTING ATTORNEYS.	It is not the duty of the prosecuting attorneys to defend charitable trusts on the part of the public.
66-43	Feb 24	PURCHASING AGENT. LEGISLATURE.	Permanent Seat of Government shall purchase supplies to be used on third and fourth floors of Capitol Building.
66-43	Sept 8	SCHOOL LOANS. PROSECUTING ATTORNEY.	If requested by county court prosecuting attorney should give written opinion on title.
66-43	Sept 10	COUNTY SINKING FUND. COUNTY CAPITAL SCHOOL FUND.	County sinking funds may be invested in United States bonds; capital school funds cannot.
66-43	May 13	DEPOSITORIES. COUNTY DEPOSITORIES. BANKS AND BANKING.	A county cannot pay bonus or fee to county depositories for taking care of county funds.
67-43	Mar 3	ELECTIONS.	Same polling place may be used for both Constitutional Convention delegates election and municipal election.

67-43	Apr 7	ELECTIONS.	Persons must be registered to vote in annual school election in City of St. Charles, Missouri.
67-43	Apr 8	RECORDER.	Recorder not to destroy original deeds and marriage licenses after they have been recorded. He must retain in his office—(only exception being chattel mortgages five years old.)
67-43	July 21	SHERIFFS. CRIMINAL COSTS.	Sheriff who is Superintendent of Public Welfare not entitled to mileage for investigating criminals.
67-43	Sept 27	MUNICIPAL CORPORATIONS.	Cities of the third class may not expend money from the general revenue fund for the purpose of obtaining a “City Plan.”
67-43	Oct 13	SHERIFFS.	County Court may allow and pay claims of sheriffs for services rendered in juvenile court.
67-43	Oct 27	SCHOOL FUND MORTGAGES.	Proper disposition of income by County Court for repossessed real estate; whether credited to interest fund or capital school fund itself.
67-43	Dec 30	FARM BUREAU.	Definition of “rural population” to be used in determining maximum appropriation.
68-43	Jan 26	OFFICERS.	Presiding judge of the county court may be appointed deputy circuit clerk.
68-43	Aug 14	LIQUOR CONTROL.	Minor may not be employed to make deliveries of liquor.
69-43	Jan 7	TAXATION. PENALTIES AND INTEREST.	Penalties and interest on taxes may not be charged in cases where the taxpayer was unable to pay the taxes before they became delinquent on account of the death of the collector. Check is not legal tender for payment of taxes.
69-43	Apr 5	TAXATION. PENALTIES.	What tax penalties persons in military service are excused from paying; how collector is to account to court for excused penalties; burden is on taxpayer to claim the right to be excused.
69-43	Apr 10	SCHOOLS.	(1) County superintendent does not have to be a taxpayer; (2) Poll books not required in elections for county superintendent.
69-43	July 23	SHERIFFS.	Commission for sale of more than one farm in a single partition suit.
71-43	Jan 8	PROBATE COURT. FEES. DENIAL OF LETTERS.	Probate Court may not charge fees for denial of letters in estates consisting wholly of social security funds and in which the assets are less than \$400.00. Probate Court may charge fees to individuals in other estates for denial of letters.
71-43	July 16	Mr. Everett H. Pittman	WITHDRAWN
72-43	Jan 26	COUNTY COURT.	(1) County court only can purchase chemicals for use of courthouse and county farm; (2) County court cannot donate cash for repair on

			city streets; and, (3) County court should deduct five per cent Victory Tax from warrant drawn on county treasurer.
72-43	Feb 20	COUNTY TREASURER. FEES AND SALARIES.	Not entitled to fees on school disbursement or levee district account.
72-43	Apr 30	CITIES, TOWNS AND VILLAGES. BOARD OF PUBLIC WORKS.	Authority of board of public works subject to board of aldermen.
72-43	July 9	Hon. Thomas V. Proctor	WITHDRAWN
72-43	July 17	TAXATION.	The lien for taxes imposed on insurance on taxable property by the provisions of Section 11173 is applicable to the City of St. Louis and St. Louis County.
72-43	Dec 27	Hon. Charles A. Prather	WITHDRAWN
73-43	Mar 8	ELECTIONS. CONSTITUTIONAL CONVENTION.	Clerk shall notify judges of their selection to act at election of delegates to Constitutional Convention.
73-43	Apr 6	SHERIFF – BOND.	County court liable for premium on surety bond when approved by county court.
73-43	June 3	Hon. W. Oliver Rasch	WITHDRAWN
74-43	Jan 22	SCHOOLS.	Where pupils of a district not maintaining a high school attend high school in another district, under Sec. 10458, R. S. 1939, such district is legally obligated to pay tuition of such pupils even though they are orphans.
74-43	Dec 17	SCHOOLS.	School Board may contract with the Superintendent of Schools for more than one year.
76-43	Feb 9	RECORDER OF DEEDS. CIRCUIT CLERK.	Cannot charge for certified copies of papers, but may charge fifty cents for certificate.
76-43	Mar 25	ELECTIONS.	The County Court may make any reasonable allowance to election Clerk for returning the poll books.
76-43	May 1	RECORDER OF DEED.	Certificate of title must be produced, and fact of mortgage noted thereon be satisfied to satisfy mortgage on motor vehicle.
77-43	Jan 11	RECORDER OF DEEDS.	Recorder of deeds cannot charge for duplicate certified copies of marriage licenses issued to a member of the Armed Forces.
77-43	Apr 19	MOTOR VEHICLES.	Transfer of ownership by corporation to partnership requires purchase

			of new license plates.
78-43	Feb 20	SCHOOLS.	School board cannot extend the number of hours of a school day beyond six.
78-43	Feb 26	SCHOOLS.	Three questions as to validity of proceedings under Section 10631 R. S. Mo., 1939.
78-43	July 12	SCHOOLS.	School district in order to qualify for central high school building aid must erect building on tract of not less than five (5) acres subject to approval of plans by State Superintendent of Schools.
78-43	Aug 10	SCHOOLS.	A School Board, having option for apportionment of school aid under either of two statutes, required to continue under statute selected under the option plan.
78-43	Oct 25	SCHOOLS.	What constitutes erection of building so as to entitle district to state aid.
78-43	Nov 17	SCHOOLS.	Construing House Bill No. 494, which will become new Section 10454. The maximum constitutional levy for consolidated school districts not containing an incorporated town or village within boundaries is sixty-five cents on the hundred dollar valuation. Additional apportionment and as provided for in this section is to be made on attendance of pupils belonging to the district.
79-43	Aug 2	SCHOOLS.	State Superintendent of Schools may authorize and approve state aid for special classes for physically and mentally handicapped children for less than the maximum amount allowed under the statutes.
79-43	Aug 4	INSURANCE.	Approval of Articles of Incorporation of Jefferson Mutual Fire Insurance Company of St. Louis, amending its charter.
80-43	May 15	SCHOOLS. COUNTY TEXTBOOK COMMISSION.	Vacancies filled by appointment by Governor.
80-43	Dec 3	LINCOLN UNIVERSITY.	Powers and functions of Board of Curators with respect to operation and maintenance of institution.
81-43	Mar 1	COUNTY COURTS. COUNTY BUDGET.	County court may designate an emergency bridge fund to Class 5 of the county budget and make transfers to provide available funds for aid to special road districts.
81-43	Mar 23	TAXATION. COUNTY COLLECTOR.	Appointee holds until the successor qualifies. Penalties should not be charged when payment of taxes cannot be made.
81-43	Mar 29	JUVENILE DELINQUENTS.	Section 9004, R. S. 1939 does not apply.
81-43	Apr 28	RECORDER OF DEEDS.	Recorder has no authority to note upon the records a partial release of

			property contained in a mortgage.
81-43	May 4	TAXATION.	Personal property in Missouri owned by soldier, who is nonresident of this State, and only here in compliance with military orders, is not taxable in Missouri.
81-43	Sept 1	ROADS AND BRIDGES.	Moneys in contingent fund may be used for roads in common road districts.
81-43	Sept 10	TAXATION – COMPROMISE OF TAXES.	County Court may compromise taxes and include penalties and interest in the compromise.
81-43	Nov 26	TAXATION.	Church not required to pay taxes on property used for religious or charitable purposes where the property does not exceed one acre in area.
81-43	Dec 15	MARRIAGE.	Under blood test law, person with negative laboratory report need not have physician's certificate that he is free from syphilis; definition of "public health laboratory" as respects free tests.
82-43	Mar 5	SCHOOLS. ELECTIONS.	Qualified voters must vote for County Superintendent in the district in which they reside.
82-43	Mar 5	COUNTY TREASURER AND COUNTY REPORTERS.	Court reporter and not county treasurer preserves official notes of court reporter.
82-43	Mar 29	VOTER. FOR RAISE OF SCHOOL LEVY.	Voter to qualify for voting to raise the annual school levy must have all of the general qualifications as to age and residence, and in addition, must be a resident taxpayer.
82-43	June 2	CRIMINAL COSTS.	Upon felony conviction State should not pay defendant's witness fees.
83-43	Mar 1	COMMISSIONER OF HEALTH.	Not entitled to \$10 per day as secretary, nor \$10.00 per day as member of board in addition to his annual compensation of \$5,000.00.
83-43	Mar 4	LIEUTENANT GOVERNOR.	Compensation of President and President pro tempore of Senate, authority for paying, amount of, how paid, out of what funds and whether such officers are included in 75 employees allowed Senate.
83-43	Mar 9	COUNTY TREASURER. OFFICERS. BONDS.	County is liable for premium on surety bond where the officer elects to give surety bond and county court consents thereto.
83-43	Mar 11	MOTOR VEHICLES.	Student operator need not obtain chauffeur's license.
83-43	May 6	WITNESS. FEES.	Witness in criminal case once subpoenaed shall attend case until discharged. In change of venue witness need not be resubpoenaed.
83-43	May 12	SCHOOLS.	Board of directors of consolidated school districts have authority to sell

			property of an annexed school district.
83-43	May 13	FENCES – DIVISION. CEMETERIES.	Division fences between cemeteries and lands owned by private individuals subject to statutes relating to division fences.
83-43	May 14	TAXATION. COLLECTOR'S SETTLEMENT. COUNTY COURT.	County Court's procedure in making settlement with collector on delinquent lists.
83-43	June 2	OFFICERS.	Sheriffs may serve civil and criminal process in military reservations.
83-43	June 15	Hon. Forrest Smith	WITHDRAWN
83-43	July 12	ESCHEAT.	State is entitled to possession of escheated property; no provision governing what agency of state has charge of such property.
83-43	July 29	OFFICERS. LEGISLATORS.	Discussion of question of appointment of legislators to positions in state departments.
83-43	Aug 16	RECORDER.	May not record statement that records of General Land Office show a patent has been issued.
83-43	Aug 19	LAWS. COURTS, TERMS OF.	Effective date of under Sec. 36 of Art 4 of Constitution as amended. Effect of change of terms by legislative enactment (House Bill No. 509).
83-43	Aug 25	PROBATE JUDGES.	Senate Bill No. 4 does not invalidly increase or decrease pay; how clerk is compensated; when monthly account may be made.
83-43	Sept 14	INCOME TAX.	Members of the military of naval forces do not have to make income tax returns, nor pay income taxes – civil officer – not being a prisoner of war or detained by any foreign government liable.
83-43	Sept 18	STATE AUDITOR. WARRANTS.	May not draw one warrant covering expenditure of three institutions from six different appropriations.
83-43	Sept 24	BURIAL SOCIETIES.	Person regularly receiving and transmitting assessments to foreign burial association unlawfully acts as agent.
83-43	Oct 25	PROBATE JUDGES.	Under House Committee Substitute for Senate Bill No. 4, Probate Judges may at any time collect excess fees above their salary after they have paid fees into the county treasury equal to the amount of their annual salary.
83-43	Nov 1	SCHOOLS.	Free transportation of pupils in a consolidated School District may be determined – 1. When Board deems it advisable. 2. When approved, at election, by 2/3 voters who are taxpayers. Board's discretion in formulating needful rules will prevail in either case. Non-resident pupils may be admitted to District and may be transported same as pupils within District.

83-43	Dec 9	STATE BOARD OF BARBER EXAMINERS. LICENSE.	Answers to three questions regarding the revoking and reissuing of barbers' licenses. Term "revoke" defined.
84-43	Mar 8	DEPOSITARIES. COUNTY FUNDS.	Money deposited in depositary by county collector, as collector, is "Public Funds."
84-43	Apr 19	COUNTY COURTS.	Two questions on power of county court to make purchases for road equipment and road expenditures.
84-43	Sept 4	PROSECUTING ATTORNEY.	To give advice to county officers regarding matters of law in which county is interested; but not his duty to advise and represent the various school boards of the county.
84-43	Sept 16	LABOR.	Industrial Inspection statute will apply to dress shops, drug stores, plumbing establishments and cooperative associations, but not to shoe shops.
84-43	Sept 16	Mr. George A. Spencer	WITHDRAWN
85-43	Mar 29	STATE BOARD OF HEALTH. REGULATIONS.	Power to transfer venereal disease patients for quarantine in hospital in the State of Missouri.
85-43	Apr 22	HEALTH.	Physicians, osteopaths, veterinarians and hospitals must secure state license to engage in occupations set out in Section 9834, R. S. Mo. 1939.
85-43	July 13	HEALTH, STATE BOARD OF. OPERATION OF HOSPITAL.	State Board of Health may operate hospital for Federal Government when all funds are furnished by the Federal Government.
85-43	July 15	NURSES.	Not unlawful for one person to represent to the public that another person is a registered or graduate nurse.
85-43	July 29	PHYSICIANS AND SURGEONS. OBSTETRICS.	Who may practice in Missouri.
85-43	Sept 13	HEALTH REGULATION.	Regulation to Commissioner of Health in regard to eggs.
85-43	Oct 6	STATE BOARD OF HEALTH.	1) Present and Acting Board has no jurisdiction or authority to entertain a petition to reinstate license "Permanently revoked" by predecessor board. 2) "Revoke" as used in section 9990 R.S. Mo. 1939, means permanent revocation where no definite period of time is stated. 3) Revocation of license by predecessor board does not prevent a subsequent board from granting a license based on new application.

85-43	Oct 11	MOTOR VEHICLES LICENSES. FEDERAL AGENCIES.	Motor vehicles of Defense Plant Corporation not subject to license fee. Motor vehicles leased or rented by Pratt-Whitney liable for tax. Fee for title chargeable against Defense Plant Corp. or Pratt & Whitney.
85-43	Oct 14	CITIES, FOURTH CLASS.	May charge reasonable fee for use of sewers.
85-43	Oct 28	MOTOR VEHICLES.	Construing H. B. 240 passed by 62nd General Assembly. Commissioner of Motor Vehicles shall register motor vehicles by gross weight, which includes vehicle and load. Fees for registration to be collected and accounted for by Commissioner and credit for 85% of such fees to be allowed by Public Service Comm. in applying for permit to haul persons or property for hire.
85-43	Nov 19	OFFICERS.	(1) Prosecuting Attorney of the City of St. Louis has only jurisdiction concurrent with the St. Louis Court of Criminal Correction; (2) It is the duty of the Circuit Attorney of the City of St. Louis to enforce the provisions relative to the State Food and Drug laws.
87-43	Feb 11	Hon. W. W. Sunderwirth	WITHDRAWN
87-43	Feb 16	CONSTITUTION CONVENTION.	Method of nominating delegates to the Constitutional Convention.
87-43	Mar 25	HOUSE BILL NO. 45.	Does not include Osteopaths.
88-43	Jan 16	OFFICERS. JUSTICE OF THE PEACE.	Justices of the peace may hold the office of deputy recorder of deeds at the same time.
88-43	Jan 16	ELECTIONS. CONSTITUTIONAL CONVENTION.	Mode of conducting election of delegates to Constitutional Convention.
88-43	Feb 5	SALARIES AND FEES. COUNTY ASSESSOR.	In counties of less than 100,000 the assessor is entitled to fees of \$5,000.00, exclusive of deputy hire.
88-43	Feb 26	ROADS AND BRIDGES.	Town board cannot vote by mail in eight-mile road district, when the city limits of the city is not situated more than ten miles from county seat.
88-43	Mar 5	COUNTY COLLECTOR.	May not make daily reports and deposits with county treasurer unless authorized by statute.
88-43	June 17	COUNTY CLERK. RECORDER OF DEEDS.	May not establish branch offices unless authorized by statute.
88-43	Nov 8	SHERIFF'S FEES.	For summoning standing jury; for summoning special jury.

88-43	Dec 16	CIRCUIT CLERK. COMPENSATION.	Not authorized to charge and retain fee for acting as custodian of funds paid into court.
89-43	Jan 5	ROADS AND BRIDGES.	Township board cannot lease road machinery belonging to road district to be used outside of the road district in the township, under township organization.
89-43	Feb 11	CONSTITUTIONAL LAW.	Amendments to legislative acts must conform to the original purpose of the act, under Art. IV, Sec. 25, Constitution of Missouri.
89-43	Mar 23	COUNTY COURTS. ROAD BOND TAX FUNDS.	Court may issue warrants on funds anticipated from taxes authorized by a bond issue; constitutionality of Section 13763; special road districts may not expend any of such funds. Manner of determining the amount of anticipated revenue from such taxes.
89-43	Apr 27	Hon. D. D. Thomas, Jr.	WITHDRAWN
89-43	May 4	SCHOOLS.	Directors cannot invest surplus funds in United States Bonds.
89-43	May 12	OFFICERS.	Salaries of elected officers of city operating under special charter may, by ordinance, be reduced.
89-43	Nov 26	COUNTY COURT. BONDS.	Authority to settle or compromise for an amount less than sued for on surety bond.
90-43	Mar 16	LABOR.	Construction of Section 5082, R. S. 1939, relative to the payment of discharged employees, and 5080 relative to the payment for discharge of employees.
90-43	Mar 16	LABOR.	State statute regulating the hours of employment for women is superseded by the Railway Labor Act wherein it limits to interstate commerce.
90-43	Mar 19	LABOR DEPARTMENT. STREET RAILROADS.	Section 10176, or Section 14810, R.S.Mo. 1939, pertaining to payment of employees, does not apply to street railroads.
90-43	Mar 31	EMPLOYMENT CONTRACT. USURY.	Contract charging 60% for obtaining a job is not usury.
90-43	Apr 20	LABOR.	(1) Municipally owned utility companies are subject to inspection by Labor Commissioners; (2) The prosecuting attorney of the county wherein the business establishment is located, shall enforce the provisions of Section 10180, R. S. 1939.
90-43	June 11	CHILDREN. LABOR.	Provision in section takes precedence over the whole section.
90-43	June 25	HOURS OF LABOR. FEMALE EMPLOYEES.	Female employee may not be employed more than nine hours in any one day or more than fifty-four hours during any one week.

90-43	June 30	LABOR.	Construction and application of Section 10175, Missouri, R. S., 1939.
90-43	Oct 19	LABOR. WOMEN.	Under Laws 1913, p. 400 females may not be employed in state for more than 9 hours a day or 54 hours a week.
90-43	Nov 3	LABOR.	Section 7815, page 400, Laws of Missouri, 1913, prevents female employees from working full time under such Act at plant and then taking work out to be done at home.
90-43	Dec 29	EMPLOYMENT BUREAUS.	The Department of Labor and Industrial Inspection has no discretion to refuse a license to applicant to operate an employment agency. Its duty to license is ministerial.
92-43	June 25	CRIMINAL LAW.	Illinois licensee entitled to recognition under reciprocity.
93-43	Aug 17	OFFICERS.	Surveyor may appoint deputy in counties with population between 20,000 and 50,000 inhabitants and such deputy may act as the deputy county highway engineer.
94-43	Oct 11	SHERIFFS. CONTEMPT.	Sheriffs may be guilty of contempt of court in failing to transport prisoners within a reasonable period after their sentence.
95-43	Mar 11	TAXATION. SALES TAX.	The fact that proceeds from a moving picture show are contributed to the Red Cross does not relieve the theatre from collecting the sales tax.
96-43	July 12	FEES OF CIRCUIT CLERKS.	Clerk of Washington County entitled to \$400.00 per annum for services rendered as clerk of juvenile court or clerk of juvenile division of circuit court.
96-43	Sept 13	CIRCUIT CLERKS.	Not entitled to fee provided by Sec. 717, R. S. 1939; said section repealed by House Bill 177 passed by 59th General Assembly.
97-43	Jan 16	ROAD DISTRICTS. ORGANIZATION. PUBLICATIONS.	Publication of notices of filing of petition to form a special road district must comply with statute.
97-43	Jan 16	COUNTY COURTS.	Under Section 13713, R. S. Mo. 1939, must repair county buildings out of insurance monies.
97-43	Feb 6	RECORDER OF DEEDS. OFFICE SUPPLIES.	The Recorder of Deeds, subject to the provisions of the Budget Act, may purchase supplies necessary to keep and maintain his office.
97-43	Apr 15	CITY OF THE THIRD CLASS.	Not authorized to invest "reserve fund" in United States Bonds.
97-43	Apr 29	POISONS.	Record of sale of poisonous substances used in the arts or as insecticide, not necessary.
97-43	Aug 23	SPECIAL ROAD	May spend one-fourth of their revenue on streets of cities located in

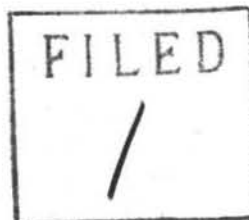
		DISTRICTS.	such districts.
97-43	Aug 24	SHERIFF'S FEES.	Services in connection with orders of State Board of Health in venereal disease control.
97-43	Sept 10	SPECIAL ROAD DISTRICTS.	(1) Possession of records and books to be in the clerk of the board of commissioners; (2) Treasurer of special road district shall furnish a bond.
97-43	Sept 17	PHARMACY.	Household remedies and drugs which may be sold in general stores.
97-43	Oct 11	COUNTY TEXTBOOK COMMISSION.	Statute creating county school textbook commission imposes mandatory duty on county court to appoint members of the commission. This duty may be enforced by mandamus action.
97-43	Oct 29	DELINQUENT CHILDREN.	1) Section 9703, R. S. Mo. 1939, construed concerning judge's authority to tax costs. Against whom. 2) When costs are to be paid by the county Court pursuant to Sec. 9703, R.S.Mo. 1939, Circuit Clk. shall follow same procedure in the collection thereof as used in the collection of criminal costs.
98-43	Dec 9	PURCHASING AGENT. PERMANENT SEAT OF GOVERNMENT.	Commissioner of Permanent Seat of Government has authority to hire labor to paint interior of State Capitol.
99-43	Jan 22	OFFICERS. JUSTICE OF THE PEACE.	Failure to qualify authorizes predecessor to continue in office.
99-43	Jan 23	SHERIFF'S FEES.	Not entitled to charge fee unless service is rendered.
99-43	Feb 3	MUNICIPAL CORPORATIONS.	City of the third class liable for court costs, except in certain instances.
99-43	Mar 6	Hon A. L. Wright	WITHDRAWN
99-43	Mar 11	ELECTIONS.	Election clerks in the Constitutional Convention delegate election selected by the judges of such election.
99-43	Apr 26	GUARDIANS.	Parents of minor children under fourteen years of age may waive their rights as natural guardians, and a guardian of the person and estates of such children may be appointed by the Probate Court.
99-43	Apr 27	PROSECUTING ATTORNEY.	May maintain the office anywhere.
99-43	May 7	SHERIFFS.	No fee unless expressly authorized by statute.
99-43	Oct 6	INSANE PERSONS.	Two classes of patients, county and private. Private patient may not be supported by payment to county the amount it pays to State for support as county patient.

99-43	Nov 16	COUNTY COURTS. POOL TABLE LICENSE.	County Court is not authorized to collect a license tax from a club where tables are used by members without charge.
100-43	Aug 25	SHERIFF'S FEES.	Fees of Sheriff for commitment in cases where defendant is sentenced to Algoa.

CONSTITUTIONAL CONVENTION:
NOMINATION OF DELEGATES:

Members of Senatorial Committee convened to nominate delegates for election as members of Constitutional Convention, may not count votes by proxy of any such member absent from such convention.

February 26, 1943



2-27

Mr. George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you request an opinion from this department on the question of whether or not a member of a Senatorial Committee may vote by proxy at a convention of such Senatorial Committee convened for the purpose of nominating delegates for election as members of the Constitutional Convention.

The Senatorial Committee is made up of the Chairman and Vice-Chairman of the Central Committees of the various counties composing the Senatorial District. Such parties are members of this Senatorial Committee by virtue of the fact that they have been elected as members of the Central Committee in their respective counties.

In the case of State ex rel. Ponath v. Hamilton, 240 S. W. 445, the court held that members of the Central Committee are county officers. The members of the Senatorial Committee exercise a discretion in matters pertaining to elections or nominations. Under Section 3 of Article XV of the Constitution, which pertains to the Constitutional Convention, we find the following which relates to the duties of the Committee in regard to making nominations for delegates to the Constitutional Convention:

"* * * In order to secure representation from different political parties in each senatorial district, each political party as then authorized by law to make nominations for the office of state senator in each senatorial district shall nominate only one candidate for delegate from such senatorial district, and such candidate shall be nominated in such manner as may

be prescribed by the senatorial committee of the respective parties, and a certificate of nomination shall be filed in the office of the secretary of state at least thirty days before such election, * * * * *

Your inquiry resolves itself into a question of whether or not the members of the Committee may delegate their powers by proxy to nominate these delegates.

In Vol. 46 C. J., page 1032, at Sec. 291, we find the rule announced as follows:

"A officer to whom a discretion is entrusted, cannot delegate the exercise thereof, * * *"

We also find that this rule has been applied and followed in Missouri. State ex rel. Skrainka Const. Co. v. Reber, 226 Mo. 229, 1. c. 237, states the following:

"* * * An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, * * * * *

Also, in Powers v. Kansas City, 224 Mo. App. 70, 1. c. 79, the court, in speaking of the authority of an officer to delegate his duties, made this statement:

"He cannot delegate those duties which call for the exercise of his discretion, * * * * *

In Vol. 12, Words and Phrases, Permanent Ed., page 594, the word "discretion" is defined as follows:

"'Discretion' may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others. * * * * *

Under this definition we think there can be no question but that when the members of the Committee are voting for the nomination of some person that they are exercising a discretionary power, and therefore, do not have any authority to delegate this power to some other person.

CONCLUSION

From the foregoing, it is the opinion of this department that a member of the Senatorial Committee may not vote by proxy at a convention of the Senatorial Committee convened for the purpose of nominating a delegate for election to membership in the Constitutional Convention.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

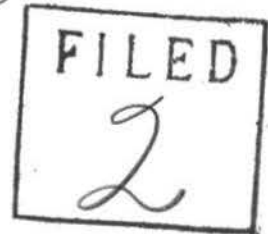
ROY MCKITTRICK
Attorney-General

TWB:CP

TAXATION : Construction of proposed amendment to the
SALES TAX : exemption section of House Bill 125, by
EXEMPTION : Mr. Andrae.

April 24, 1943

4-26



Hon. Henry Andrae
Representative of Cole County
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the construction of two proposed amendments to the Exemption Section of the Sales Tax Act now before the House of Representatives in House Bill No. 125.

The proposed amendments are as follows:

"Amend House Bill No. 125; Page 7; Section 11409; Lines 4, 5 and 6; by inserting a comma after the word 'sales' in line 4, and by striking out all of line 4 after the word 'sales', all of line 5, and all that part of line 6 preceding the comma in said line, and by inserting the following in lieu thereof:

"the tax upon which would be construed as a direct burden upon interstate commerce or as a tax levied upon sales made outside this state of articles for use within this state.

"Amend House Bill No. 125; Page 5; Section 11407; by adding a subsection immediately after subsection (L) on page 5 to be known as subsection (m) and to read as follows:

"(m) Nothing in this act shall be construed as imposing a use tax."

The Missouri Supreme Court in the case of Mississippi River Fuel Corporation v. Smith, 164 S. W. (2d) 370 l.c. 377, in construing the language of the Exemption Section where it

contained the words:

"as may be made in commerce in this state and any other state of the United States, or between this state and any foreign country.* *"

said; l.c. 377:

"* * * Of course, this language means sales between citizens of this state and citizens of any other state, and to this we agree. Sec. 11408, R.S. 1939, amended in 1941, Laws 1941, p. 701, Mo. R.S.A. 11408, but not as to the language here quoted, provides that the sales tax shall be levied 'upon every retail sale in this State of tangible personal property', and Sec. 11409 does no more than to exempt from the sales tax sales made in interstate commerce.* *
* *"

The proposed amendment proposes to exempt from the act retail sale transactions, upon which the imposition of the taxes would be construed as a direct burden on interstate commerce. In the case of *McGaldwick vs. Berwind White Coal and Mining Company*, 309 U. S. 33, 60 S. Ct. 388, the court in speaking of the authority of states to enact legislation affecting interstate commerce, said, at l.c. 391:

"Section 8, clause 3, article 1, of the Constitution declares that 'Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *.' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons v. Ogden*, 9 Wheat. 1, 187, 6 L.Ed. 23; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303

U.S. 177, 185, 58 S.Ct. 510, 513, 82 L.Ed. 734. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

and at l.c. 392, in speaking of taxes which states may impose without burdening commerce, the court said:

"* * * A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. * * *"

and in speaking of taxes which the states may not impose because they would impede or destroy interstate commerce, the court further said at l. c. 393:

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power

to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Referring to the last two statements quoted from the Berwind White case, there will be seen that there are instances where states may levy excise taxes on transactions which involve interstate commerce, and there are instances in which the states are prohibited from levying taxes on such transactions.

The entire first sentence in Section 11409 of House Bill 125 could be left out and still the state would be prohibited from imposing a tax upon interstate commerce which it would be prohibited from taxing under the Constitution or laws of the United States. We also think that the amendment which you proposed would not add anything to the prohibition to tax commerce, in other words, under the holding of the Supreme Court of the United States in the Berwind White case and cases cited therein, if the proposed tax burdens commerce more than it does intrastate commerce or if it impedes the flow of commerce, then it would be in violation of the Constitution and laws of the United States.

In regard to the portion of the proposed amendment reading as follows;

"or as a tax levied upon sales made outside this state or articles for use within this state."

Apparently the purpose of this amendment is to clarify the question of whether or not retail sales made outside of the state for purchases of property to be used in this state are taxable.

The Act imposes a tax on "retail sales" of certain articles, services, etc. The term "sale at retail" is defined as: subsection (g) of Section 11407:

"(g) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration.
* * *"

The elements, of 'sale at retail' as defined by the Act, necessary to impose the tax are:

April 24, 1943

1. The seller must be engaged in business.
2. There must be a transfer of title or ownership of the property sold.
3. There must be a valuable consideration.
4. The property sold must be for use or consumption and not for resale in any form as tangible personal property.

Your amendment relates to the second and fourth elements, of the sale, which are; transfer of the title and the use or consumption of the article. In the Berwind White case quoted above, the Supreme Court of the United States ruled that if either of the elements which constitute a 'retail sale' takes place within the state in which the tax is imposed, then the state is authorized to collect the tax.

Following this reasoning and answering your question, We will say that if the ownership and title to the property sold, under a 'retail sale' made outside this state, passes outside the state, then the tax may not be imposed regardless of the fact that the articles are bought for use and consumption in the state of Missouri.

Answering your inquiry as to whether or not House Bill 125 could be construed as a 'use tax', we refer you to our opinion to Senator Falzone, in which our holdings are that this tax is not a 'use tax'. We are enclosing a copy of this opinion for your information.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB/mh

COUNTY: Stickers should be placed on ballots
voted in bond election for airport.

November 8, 1943

11-15
FILED

2

Honorable Morris Anderson
Assistant Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We are in receipt of your letter of November 3, wherein you requested an opinion from this department. Your request reads as follows:

"I would like an opinion from your office on the following matter which is something new.

In November, this county will hold a special bond election for the purpose of building a flying field. This is our first election since the repeal of Section 11607, A. S. 1939, and the enactment of the new section which provides that the election judges shall cover the identifying numbers on the ballot by pasting a sticker, etc.

I would appreciate an opinion as to whether this requirement is necessary in special bond elections."

From the reading of your request we presume that Marion county is issuing bonds in pursuance to the authority given under Article 3, Chapter 123, Revised Statutes of Missouri, 1939, and particularly Section 15125 of said article, a portion of which we are quoting:

" * * * * * The purchase price or award for real property acquired for an airport or landing field may be paid for wholly or partly from the proceeds of the sale of bonds of such city, village, town, or county, as the local legislative body of such city, village, town or county shall determine,

subject, however, to the adoption of a proposition therefor at an election to be held in such city, town, village or county for such purpose."

It will be noted from the reading of Article 3, supra, that there is contained in said article no section setting up a procedure for the conducting of a special election. Therefore, we must turn to the general statutes governing where a special election is to be held and particularly call your attention to Section 11516, R. S. Mo. 1939, which reads as follows:

"Such special election, except as provided in the preceding section, shall, as near as possible, be conducted in the same manner, and be governed by the same laws, as a general election."

We also quote Section 11515, due to the fact that Section 11516 makes reference to such section:

"In all counties in this state in which a special election shall be held for the purpose of voting upon any proposition to issue bonds for any purpose, which, under the law, must be submitted to the vote of the qualified electors for determination, two judges and two clerks of such election shall be appointed by the county court for each special election precinct: Provided, that the provisions of this law shall not apply when any such proposition is submitted to be voted upon at a regular primary election or a general election."

It will be noted from the reading of Section 11516 that such special elections are to be governed by the same laws as a general election. Now turning to the section controlling general elections, we find that we are governed by Section 11607, Laws 1941, p. 363, which section reads as follows:

"Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or

November 8, 1943

numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths (3/8) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the County Clerk or Board of Election Commissioners of each county or city, and no sticker shall be removed except in case of contested elections, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

Conclusion

Therefore, it is the opinion of this department that stickers should be used on the ballots which are voted in special elections held to empower the county to issue bonds to purchase airport or airfield.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BRC:ml

CONSERVATION
COMMISSION:
LEGISLATION:

The authority of the Legislature under
Section 16, Article 14 of the Constitu-
tion of the State of Missouri.

February 26, 1943



Honorable O. K. Armstrong
Representative, Third District
Greene County

Honorable Lee Hamlin
Representative, Tenth District
Jackson County

Missouri House of Representatives
Jefferson City, Missouri

Gentlemen:

This will acknowledge receipt of your request
for an opinion under date of February 9, 1943, which reads:

"We respectfully request a ruling from your office as to the power of the General Assembly to legislate upon questions concerning the administration of the State Conservation Commission. Clearly, the 'control, management, restoration, conservation and regulation of bird, fish, game, forestry and all wild life reservations of the State' is vested, by the constitutional provisions, Article XLV, Section 16, in the Commission.

"However, after setting forth certain other provisions, having to do with the personnel, tenure, etc., of the members and officers of the Commission, the constitutional section states:

"The General Assembly may enact laws in aid of

Hon. O. K. Armstrong
Hon. Lee Hamlin

-2-

February 26, 1943

but not inconsistent with the provisions of this amendment.'

"We do not think it was the meaning or intent of this section to preclude or prohibit any further fish, game and general wild-life legislation. What acts, then, are 'in aid of but not inconsistent with' this section?

"Specifically, the Commission has drawn up numerous rules and regulations. Could not the General Assembly pass legislation modifying, or amending, any such rules, if not inconsistent with the powers specifically granted the Commission?

"Let us take for example the rule which requires agents of the Commission to carry guns at all times. Nothing in the constitutional section pertains to the arming of agents nor their conduct generally. Could not the General Assembly enact legislation affecting such administrative acts of the Commission and its agents, without infringing upon the powers granted the Commission?

"Cannot the General Assembly legislate upon the conduct of agents in search and seizure matters? In matters relating to the construction of fish ladders? In reports made by the Commission to the public?"

The people of this State on November 3, 1936, adop-

Hon. O. K. Armstrong
Hon. Lee Hamlin

-3-

February 23, 1943

ted an amendment to the Constitution of this State now designated as Section 16 of Article XIV of the Constitution, the pertinent portions of which are as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game and forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. * * * * * Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment.

Hon. O. K. Armstrong
Hon. Lee Hamlin

-4-

February 23, 1943

The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose. The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

This constitutional amendment has been held valid and self-enforcing except as to penalties by our Supreme Court. (Marsh v. Bartlett, 121 S. W. 2d 737).

The General Assembly normally has all powers of legislation except those expressly restrained by the State and National Constitutions. (State ex rel. Barker v. Merchant's Exchange Bank, 190 S. W., 1.c. 901; 269 Mo. 346; Wire Co. v. Wollbrinck, 275 Mo. 339, 1.c. 350, 351). However, the people, by the adoption of the conservation amendment, took from the Legislature its authority to enact laws with reference to the "control, management, restoration, conservation and regulation of" the wild life and wild life resources of the state by placing such authority in the

Hon. O. K. Armstrong
Hon. Lee Hamlin

-5-

February 23, 1943

Conservation Commission. This is demonstrated by the following language found in Marsh v. Bartlett, 121 S. W. (2d) 737, l. c. 743:

"But the present attempt to exercise it does not deprive the legislative department of the government of its power or functions but relates to only a small portion of the power reserved to the people, the exercise of which suspends and supercedes the power of the legislature as to that portion alone which involves the subject matter and its governance as provided in said Amendment. More than that, neither the submission nor the adoption of the Amendment was the exercise of a legislative function; it was an organic function, organically exercised; the General Assembly is without constitutional power to propose an amendment by the initiative process." (Emphasis added)

It was further ruled at l. c. 744:

"The sovereign people having enlisted the Conservation Commission as the constitutional agency to exercise the powers and functions granted in Amendment No. 4, it is not our function to consider or to determine the wisdom, the expediency or the policy to be executed by that body. * * * *"

Furthermore, "the administration of the laws now or hereafter pertaining thereto" is vested in the commission. By the closing language of the amendment it is provided that the General Assembly may enact any laws in aid of but not inconsistent with it; that all laws inconsis-

Hon. O. K. Armstrong
Hon. Lee Hamlin

-3-

February 23, 1943

tent with the amendment are no longer effective; and that the amendment shall be self-enforcing.

The Legislature cannot enact any manner of legislation in conflict with the conservation amendment. The Supreme Court of Missouri has even held that the provisions of the conservation amendment prevail over the constitutional amendments adopted prior thereto when in conflict with said conservation amendment. In *State ex inf. v. Bode*, 342 Mo. 162, 113 S. W. (2d) 805, it was ruled that the conservation commission could appoint a director of conservation who had not resided within this State for one year immediately preceding his appointment, contrary to Section 8 of Article X of the Constitution which provides that officers appointed shall have resided in the state one year preceding such appointment for the reason that the conservation amendment provided that the commission should determine the director's qualifications, and it was the latest expression of the will of the people.

The constitutional provision places in the commission "the control, management, restoration, conservation and regulation of bird, fish, game, forestry and all wild life reservations of the State" together with "the administration of the laws now or hereafter pertaining thereto." Difficulty may be expressed in finding as broad and general terms with which to transfer sweeping and far reaching power and equal to those used in the amendment.

The word "control" as defined by Webster's New International Dictionary means "to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action; to curb;". Words and Phrases, Vol. 9, page 429, states: "The word 'control' when broadly used, may embrace every form of control, actual or legal, direct

Hon. O. K. Armstrong
Hon. Lee Hamlin

-7-

February 26, 1943

or indirect, negative or affirmative, * * * ".

The word "management" as defined by Webster's New International Dictionary means "act or art of managing; the manner of treating, directing, carrying on, or using, for a purpose; conduct; control. Judicious use of means to accomplish an end; * * * ". Words and Phrases, Vol. 26, page 267, states: "Management is defined as government, control, superintendence, physical or manual handling or guidance, the act of managing by direction or regulation, or administration; * * * ".

The word "regulate" is defined in the Marsh case, supra, at l. c. 744 as follows: "The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. * * * " (Emphasis added).

Section 16 of Article XIV vests in the Conservation Commission the power to govern, rule and manage, according to rules made by the commission, all matters relating to bird, fish, game, forestry and wild life of the State.

The Supreme Court has held (Marsh v. Bartlett, supra) that, by reason of Section 57, Article XIV of the Constitution of Missouri (the initiative amendment), the people did not intend not only to keep the grant contained in Section 1 of such provision, but also made it serve the purpose to recall all legislative power theretofore granted to the end that the whole power should be subject to the initiative and referendum. By the adoption of the constitutional amendment creating the Conservation Commission the people

Hon. O. K. Armstrong
Hon. Lee Hamlin

-8-

February 26, 1943

withdrew from the Legislature its power to legislate on the subject matter contained in such amendment and vested the sovereign power of the people in the Conservation Commission. Such powers as are necessary to control, manage, restore, conserve and regulate the bird, fish, game, forestry and wild life of this State are now vested in the Conservation Commission by virtue of said constitutional amendment. In this constitutional amendment power is given by the sovereign people to the Legislature to make any law that may aid the Conservation Commission in carrying out and effectuating the purposes and intentions of the people as expressed in said constitutional amendment.

However, the Legislature has no power to fix any limitation or control over the Conservation Commission in the exercise of its management and regulation concerning the matters named in the amendment. The test to be applied in determining the validity of legislation concerning wild life is not whether the commission has adopted a regulation upon a particular subject but is whether the amendment authorizes the commission to make regulations on that particular matter.

The Legislature does not have the right to regulate the construction of fish ladders as the amendment gives such authority to the commission by vesting in that body the "control, management, restoration, conservation and regulation of * fish."

The Legislature has no authority or power to interfere with the Conservation Commission using whatever reasonable method it may deem necessary to conserve and restore bird, fish, game, forestry and the wild life re-

Hon. O. K. Armstrong
Hon. Lee Hamlin

-9-

February 26, 1943

sources of the State. If the commission deems it is necessary to carry out such purposes it may arm its agents, or any agent.

Neither does the General Assembly have the authority to pass any act that would prohibit agents of the Conservation Commission from making reasonable searches and seizures in executing the commission's power and authority to control, regulate and conserve bird, fish, game, forestry and wild life. Thus the Legislature cannot, by statutory enactment, interfere with the commission in controlling, conserving and carrying out every purpose expressly and necessarily impliedly given the commission by the amendment. The determination of what is necessary and the method that is necessary to carry out the purposes of the amendment is vested in the commission and not in the Legislature.

The Conservation Amendment does not authorize the commission to assess penalties for the violation of regulations, and the Legislature thus has the authority to determine what punishment, if any, will be inflicted for such violations. In *Marsh v. Bartlett*, supra, l. c. 744, the following appears:

"It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty. * * * * * Hence it follows that unless there be existing statutes that are not inconsistent with the Amendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite."

Hon. O. K. Armstrong
Hon. Lee Hamlin

-10-

February 26, 1943

CONCLUSION

This department is of the opinion, based upon the decisions of State ex inf. McKittrick v. Bode and Marsh v. Bartlett, that the Legislature has no right to legislate upon subjects exclusively given to the Conservation Commission. Our judgment is that, at the present time, the Legislature's action with reference to wild life is confined to the determination of what punishment, if any, may be imposed for violations of the commission's regulations.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

VCT:FS

INSURANCE:
PENAL DEPARTMENT:
APPROPRIATIONS:

A five-year contract for insurance for the protection of penal institutions may be executed and payment made out of the biennial appropriation for 1943-1944.

April 29, 1943



Mr. Karl Autenrieth
Auditor
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request, for an official opinion, which reads:

"Will you give us an opinion at the very earliest possible moment as to whether or not we can contract and pay for Boiler Insurance covering a five-year period.

"There is quite a saving in purchasing insurance on this basis rather than yearly. However, the question arises whether or not the Board can legally enter into a contract of this nature and pay for the service out of present appropriation, (1943-1944). This insurance covers liability and property damage at all of our institutions.

"Present policy expired April 15, 1943."

The Commissioners of the Department of Penal Institutions have the control and management of all Penal Institutions. Section 8972, R. S. Missouri 1939, in part reads:

"* * * * *The Department of Penal Institutions shall be under the control

April 29, 1943

* * * * *three members,* * * * *
who shall have and exercise the powers,
and perform the duties and functions
in this article provided, and as other-
wise authorized by law. * * * * *
Said department of penal institutions
shall have and exercise control and
jurisdiction over all penal institutions
in this state supported in whole or in
part by the direct appropriation of
money out of the state treasury, * * *
together with all real estate, build-
ings, machinery and personal property
belonging to or used by, or in connec-
tion with, said penal institutions, or
any thereof."

Section 8985, R. S. Missouri 1939, in part reads:

"The commission of the department of
penal institutions shall, subject to
law, have the exclusive government,
regulation and control of the Missouri
state penitentiary,* * * * *
and shall be vested with and possessed
of all other powers and duties neces-
sary and proper to enable it to carry
out fully and effectually all the pur-
poses of this article. * * * * *"

In Walker v. Linn County, 72 Missouri 650, 1. c. 653,
the court held that the county court had authority to enter into
a contract of insurance on buildings belonging to the county in
order to preserve said buildings. We believe that the duty de-
volving upon the commissioners of the Department of Penal Insti-
tutions in the foregoing sections will permit said commission
taking out insurance for the protection of said buildings. Fur-
thermore, assuming that the Sixty-second General Assembly shall
pass and the Governor approve House Bill #411 in its present form,
which represents an appropriation for said penal institutions, we
are of the opinion said appropriation is broad enough to cover
such contemplated contract of insurance under "operation" which
specifically includes the word "insurance". Such appropriation
is for the years 1943-1944.

Now, we come to the important feature in your request, that is, can the commission enter into a contract for insurance for the next five years and pay for such insurance from the appropriation for 1943 and 1944. In the first instance such a contract must be finally executed by the purchasing agent for the State. Under Section 14590, R. S. Missouri 1939, it provides the purchasing agent shall purchase all supplies for all departments with the exceptions of printing, binding and paper.

"The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in chapter 120, R. S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

Supplies are defined in Section 14599, R. S. Missouri 1939, which reads:

"The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this chapter shall be deemed to mean department, office, board commission, bureau, institution, or any other agency of the state."

It is our opinion that the purchase of insurance comes under the term 'contractual services' and therefore it becomes the duty of the purchasing agent to contract for any such insurance.

The Supreme Court has often ruled that when a city, county, town, township or other political corporation or political subdivision of the State enters into a contract which is executory and contingent it does not create a debt within the meaning of Section 12, Article X of the Constitution of Missouri. An example is where a contract is entered into whereby the political

April 29, 1943

subdivision agrees to pay \$2000.00 annually over a period of twenty years, and the county agrees to furnish waters for that consideration; if the water is not furnished there is no agreement to pay. (See Lamar W. & E. L. Co. v. City of Lamar, 128 Missouri 188; 140 Missouri 156.)

An example of a contract which is not executory and not contingent, which is an attempt to anticipate income and revenue of the county for several years following the year the contract became effective, and which constitutes a debt and is void, is where the county agrees to pay \$4320.00 for the use of rooms for four years, beginning August 1, 1925, payable \$90.00 on the first day of each month in advance. Such payment comes from income of future years and such payment is not contingent upon the occupancy of the rooms or by the furnishing of said rooms to the county for that purpose. (See Ebert v. Jackson Co., 70 S. W. (2) 918, 1. c. 920.) While the above examples and authority are not exactly in point in determining the question herein, it is somewhat analogous in that the political subdivision must not exceed the anticipated revenue for the current year and cannot anticipate revenue in years to come unless such agreement or contract is executory and contingent.

Article X, Section 19 of the Constitution of Missouri provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

It will be seen from the foregoing provision that an appropriation cannot be drawn upon after two years from the date of

April 29, 1943

passage of said appropriation act. Under State ex rel. v. Holladay, 64 Missouri 526, the court expressed the view that each legislature should appropriate money for the biennium for which it was elected and that an appropriation made by one legislature should not remain open to be drawn upon by future legislators for obligations incurred after the two years had lapsed from passage of said appropriation act. However, we find no decision prohibiting the execution of an insurance contract covering protection to penal buildings for the next five years and the premium for the five years period being paid, now, out of the appropriation for the years and biennium, 1943-1944. Such premium could not be extended and paid out of anticipated appropriations in future years. This expenditure comes within the contemplated appropriation, namely, House Bill 411 which specifically permits the expenditure of such appropriation for insurance. We are, of course, premising this opinion upon House Bill 411 being passed and approved by the Governor in its present form.

We understand one reason for desiring to execute a contract for a five years period is that it follows the custom and by so doing it is quite a saving to the State of Missouri.

Therefore, it is the opinion of this Department that such a contract may be executed by the state purchasing agent and said premium upon said policy shall be paid out of the appropriation for the biennium, 1943-1944.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

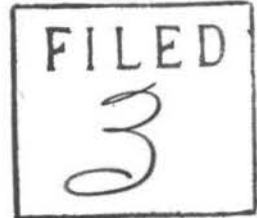
ROY McKITTRICK
Attorney General of Missouri

ARM:BAW

MARRIAGES:
CIRCUIT JUDGES:

Circuit Judges authorized to solemnize
marriages any place in the State of
Missouri.

December 18, 1943



Honorable Robert L. Aronson
Judge of the Circuit Court
Eighth Judicial District
Civil Courts Building
St. Louis, Missouri

Dear Judge Aronson:

This department is in receipt of your letter of November 20, 1943, which reads as follows:

"After further considering the matter, I believe it would be desirable if your Department would write an opinion on the question presented in my letter of November 12th, as to the power of a Circuit Judge to officiate at a wedding in a County outside his judicial circuit."

In compliance with your request for an opinion of this department, we turn to Section 3360, R. S. Mo. 1939, which reads as follows:

"Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential."

Thus marriages in Missouri may be effected by and between the contracting parties agreeing to marry the other provided they have the statutory qualifications of age, et cetera, essential to such contract, secure the required license (Laws 1943, pp. 640-641), and have the marriage solemnized by a person authorized by law to perform marriage ceremonies.

December 18, 1943

Section 3363, R. S. Mo. 1939, pertaining to the solemnization of marriages, reads as follows:

"Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

It is to be noted that this section does not restrict the authority of a judge of a court of record to his judicial territory in solemnizing marriages, and that no minute or court record is to be kept of marriage ceremonies performed by a judge.

In 38 C. J., pages 1311-1312, the following rule is announced:

"It is usually provided by statute that marriages may be solemnized by a justice of the peace or other magistrate, and unless otherwise expressly stipulated, this authority is not confined to the territory in which such officer has jurisdiction in other cases, nor is it determined upon the judicial power vested in such officer.
* * * "

It has been ruled in Missouri that the performance of a marriage ceremony is not a judicial act. In *Smith v. Pettis County*, 136 S. W. (2d) 282, 345 Mo. 839, 1. c. 848-9, the following appears:

" * * * Our decision in *City of St. Louis v. Sommers*, 148 Mo. 398, 50 S. W. 102, involving such similar facts and statutes is peculiarly apposite here. The facts in that case showed that all fees collected for services of a justice of peace were to be turned over to the city treasurer and in return the justice of the peace was to receive a stated salary from the city. The

December 18, 1943

question for decision was whether the justice was required to turn over to the city fees received for solemnizing marriages. We said that the solemnization of a marriage is in no sense a judicial act and that any marriage fee received by the justice is for services, possibly of a perambulatory nature 'wholly disconnected from his judicial character.'

* * * n

Thus the authority of a circuit judge to perform a marriage ceremony is not limited to his circuit, and in addition he does not perform a judicial act in solemnizing marriages.

CONCLUSION

It is, therefore, the opinion of this department that a circuit judge has the power and authority to solemnize marriages any place within the State of Missouri.

Respectfully submitted

EDGAR B. WOOLFOLK
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

EBW:HR

BANKS AND BANKING: Power and authority of Legislative
SMALL LOAN LAW: Committees to compel the production
LEGISLATIVE COMMITTEES: of books and records of American
Investment Company.

March 17, 1943

Mr. Walter E. Bailey, Chairman
Legislative Investigating Committee
Capitol Building
Jefferson City, Missouri

2/22
FILED

4

Dear Sir:

Under date of March 11th, 1943, we gave you our opinion relative to the power of your Investigating Committee to punish for contempt.

We now come to the other question which is stated in your telegram of March 9th, as follows:

"I request your opinion as to the power of this Committee to subpoena and compel production of records and question officers of the American Investment Company, a holding company which does not loan money to the public in this state but does loan money to some small loan companies."

Substitute Resolution for House Resolution No. 81, under which your Committee is functioning, provides as follows:

"WHEREAS, the Speaker has appointed a committee of three members of the house pursuant to Substitute Resolution for House Resolution No. 73; and

"WHEREAS, it has been charged that there is undue and improper lobbying activities upon bills which deal with the interest

rates and charges which are now being made and charged by loan companies in this State; and

"WHEREAS, there has been introduced and is pending before a committee of this House, bills which deal with the rates of interest charged or to be charged by institutions, agencies and firms loaning money to the citizens of this State and it is contemplated that other bills will be introduced in the House which deal with the rates of interest charged by other financial institutions, agencies and firms; and

"WHEREAS, it is deemed advisable that a committee be appointed to investigate and make a survey of the rates of interest charged, and the proper rates of interest which should be charged by the institutions, agencies and firms in the State of Missouri which are loaning money to its citizens, in order that the committee or committees before which said bills are pending or will be pending in this House, will have the proper information before them when these bills are considered by said committees or the House;

"NOW THEREFORE, BE IT RESOLVED, that the committee appointed pursuant to Substitute Resolution for House Resolution No. 73 be hereby authorized and empowered to make a full and complete survey and investigation of the interest rates now charged, or proposed to be charged in any bills introduced in the House by any institutions, agencies, firms or corporations doing business in this State and loaning money to the public and to the citizens of the State of Missouri; that said committee be authorized and empowered to make a survey and to investigate the

manner in which said institutions, agencies, firms or corporations operate and do business in this State, that said committee be further authorized and empowered to make an investigation of the alleged lobbying activities of any of said institutions, agencies, firms or corporations, and that said committee have and it is hereby given the power by the House of Representatives to summons and subpoena witnesses and compel their attendance, to examine witnesses and to take testimony under oath and to require the production before said committee of any and all records, documents and papers which the committee may deem necessary in making said investigation and survey and that said committee be authorized to do all things necessary to proceed with the authority given to it by this resolution; and

"BE IT FURTHER RESOLVED, that the committee be allowed the sum of not more than One Thousand Dollars (\$1000.00) in order to pay any and all necessary expenses of said committee in making said survey and investigation and in carrying out the purpose of this resolution which said expenses shall be paid out of the contingent fund of the House of Representatives."

We assume that you refer in your question to the American Investment Company of Illinois, which is incorporated under the laws of the State of Delaware and licensed to do business in Missouri, having its Missouri office in the Ambassador Building, St. Louis, Missouri.

By a reading of the Resolution set forth above, we observe that your Committee has broad powers and wide latitude in its investigation. The Resolution may be divided into two parts:

First. You are authorized and empowered to make a full and complete survey and investigate all interest rates now charged or proposed to be charged in any bills introduced in the House by any institutions, agencies, firms or corporations doing business in this state and loaning money to the public and to the citizens of the state of Missouri; that you are authorized and empowered to investigate the manner in which said institutions, agencies, firms or corporations operate and do business in this state.

Second. That said Committee is further authorized and empowered to make an investigation of the alleged lobbying activities of any of said institutions, agencies, firms or corporations.

The Committee has been limited in its investigation to the two matters as above set forth, and you desire to know in your request whether the Committee may compel the production of the books and records of the above company and subpoena the officers of such company and compel them to testify as to matters relevant to your inquiry.

The purpose of your Committee is to investigate those matters incorporated in the Resolution, and gather information and make recommendations to assist the legislature in enacting laws on the subject of interest to be charged by certain agencies mentioned above, and also to investigate the lobbying activities of such agencies.

In 59 Corpus Juris, under the title of "States" at page 98, the following rule, or rules, supported by cases from various states of the Union, is announced:

"The powers of the investigating committee, subject to limitations upon the investigating power of the legislature, are in general as broad as the resolution constituting it. While the powers allowed to a legislative committee are necessarily exceedingly broad and include a search into the subject matter of the investigation far beyond the scope of a judicial trial, not being confined to evidence such as would be required upon a trial at law, its powers are not unlimited and its inquiry must be confined to facts relevant to the inquiry, and the answer of a witness

cannot be compelled either by the legislature or one of its committees on an inquiry or investigation, except for legislative purposes or in acquiring information upon which to predicate remedial legislation. * * * * *

(Italics ours.)

Most of the cases that we have read have come up to the courts on some particular question asked the witness, or, on the question of the production of some particular record of a corporation. You have asked us to give our opinion as to whether you may go into the books and records of the American Investment Company, although we do not have before us at this time any fact or circumstance whereby the investigation of small loan companies require you to investigate this company, except the bald statement that it loans money to certain small loan companies and is a holding company for certain small loan companies. If the Committee has found some fact or circumstance of direct connection between the American Investment Company and certain small loan companies, which will aid and assist the Committee in making an intelligent and comprehensive report to the House, it may request the American Investment Company to disclose those particular facts. We do not think, however, that your Committee, without further specific information other than what you have given us, may compel the production of all the books and records of that company or any other company which loans money to small loan companies, or is a holding company for same, by reason of those facts alone.

Your Committee, as stated in the Resolution, may examine witnesses and take testimony under oath and require the production before said Committee of any and all records, documents and papers which the Committee may deem necessary in making said investigation and survey, which we interpret to mean that the Committee may question witnesses and have records produced which you may deem relevant to the matters before the Committee.

In the case of *Ex parte Conrades*, 185 Mo. 411, a Committee was appointed by the House of Delegates of the City of St. Louis "to fully and carefully investigate the books, records and accounts of the several departments (of the city) wherein

returns are made of taxes, and report their findings and recommendations as soon as possible." The court held in this case that this authorization by the House of Delegates did not empower the Committee to go into the records and question the officers of private corporations, for the reason that it did not have such right under the resolution, because it was limited by the resolution to investigate the books, records and accounts of the several departments of the city and not of other corporations.

In the case of *Ex parte Battelle*, 277 Pac. 725, 65 A.L.R. page 1497, the court held that legislative bodies of a state have the power to conduct investigations in aid of prospective legislation and as an incident to that power they possess the authority to require and compel the attendance of witnesses and the production of books and papers and, on the failure of a witness to appear, or to produce the required documents, the legislature has the power to punish for contempt.

CONCLUSION

It is, therefore, our opinion that if your Committee has, in its investigation of small loan companies, discovered some fact or circumstance which, in your opinion, would require you to investigate certain records of the American Investment Company, it may compel its officers to disclose such fact, by oral testimony or the production of its records, to ascertain that fact.

We do not think that, under this resolution, you have authority to compel the production of all the books and records of this company, but you do have authority to require the officers of the American Investment Company to testify orally before your Committee as to relevant and material facts which may be within the jurisdiction of the Committee or germane to the matters before you, or to produce their records to that extent.

Finally, it resolves itself into this question, if the officers will not disclose the pertinent facts by oral testimony, or supply those facts by their records, then, in that

Mr. Walter E. Bailey

-7-

3-17-43

event, it becomes a question for the courts to determine, based on the particular question asked or record requested to be produced, by some appropriate court proceeding.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

CRH:CP

APPROVED:

ROY MCKITTRICK
Attorney-General

COUNTY TREASURER: Must pay warrants in regular order of presentment even though judgment has been obtained on them.

May 10, 1943

Mr. H. A. Ballard
County Treasurer
Doniphan, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of May 5, 1943, which reads as follows:

"The treasury of Ripley County, Missouri has some funds in several back years. There are outstanding warrants in those years, and also some judgments against the County of Ripley based on warrants issued on the revenue for those years.

"I desire an opinion concerning whether in setting the money aside, I should ignore the warrants that have been reduced to judgment, or whether I should set aside the money and pay them in their regular order, just as if they had not been sued upon."

Section 13833 R. S. Missouri, 1939, reads as follows:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Mr. H. A. Ballard

(2)

May 10, 1943

Under the above section if a warrant is presented for payment on a fund in which there is no money, it is the duty of the county treasurer to certify that fact on the back of the warrant and the date of the presentment.

Section 13858 R. S. Missouri, 1939, partially reads as follows:

" * * * * but no county treasurer shall draw any check upon the funds in any depositary unless there is sufficient money belonging to said fund upon which said warrant is drawn to pay the same, and no money belonging to said county shall be paid by any depositary except upon checks of the county treasurer. **"

Section 13801 R. S. Missouri, 1939, partially reads as follows:

"He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same as presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: * * * * *"

Under the above partial section all warrants that have been presented and certified by the treasurer as to no funds, shall be paid in the order in which they are presented. Since we are presuming that the warrants upon which judgments have been obtained have been presented for payment, and are properly certified as to no funds, they should follow the regular order of payment, as set out in the above section. The pur-

May 10, 1943

pose of the certification of warrants, showing there are no funds in the treasury to meet them, is to entitle the owner of the warrant to an early payment and the allowance of interest on the warrants from the date of the presentment. It has been held that a county warrant only draws interest from the time of its presentation to the county treasurer, where there is no money in the treasury to pay it. (Isenhour v. Barton County, 190 Mo. 163.)

A county warrant upon which a judgment has been obtained, is merely the evidence of an indebtedness, and the judgment is not granted any priority over other warrants which were certified previous to the certification of the warrant upon which the judgment is based. That a county warrant upon which a judgment has been obtained is merely evidence of the indebtedness, was held in the case of Sturdivant Bank v. Stoddard County, 332 Mo. 568, 1. c. 572, 58 S. W. (2d) 702, where the court said:

"In Isenhour v. Barton County, 190 Mo. 163, 170, 88 S. W. 759, we held that county warrants are merely evidences of indebtedness, and that the General Assembly had the power to provide, as it did by what is now Section 12171, Revised Statutes 1929, that when any such warrant is presented for payment, if there is no money in the treasury for such purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same. Section 12139, Revised Statutes 1929, further provides that 'all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment.' (5) Also, we have ruled in State ex rel. v. Hortsman, 149 Mo. 290, 295, 50 S. W. 811 (opinion disapproved in some respects in State ex rel. v. Johnson, 162 Mo. 621, 633, 63 S. W. 390, but reaffirmed in this) that a judgment founded on a county warrant gives no preference over the warrant as to payment. * * * * *

May 10, 1943

Section 12139 R. S. Missouri, 1929, is now Section 13801 R. S. Missouri, 1939.

Also, in the case of Douglas County v. Bank of Ava, 333 Mo. 1195, 1. c. 1200, 65 S. W. (2d) 104, the court said:

" * * * It is evident here that if the defendant bank had sued plaintiff on these county warrants drawn on and payable out of the county revenue for 1930, it would not be a complete defense to show that the county had no such funds out of which to pay same, but the status of any judgment obtained against the county on these warrants drawn on the county revenue fund would be subject to the same limitations and restrictions as to payment as the warrants themselves and could not be enforced against the deposit now in question belonging to other funds. * * * *"
(Underscoring ours.)

Under the above holding the county warrants upon which judgments are obtained would be subject to the same limitations and restrictions as to payment as other warrants.

CONCLUSION

It is, therefore, the opinion of this department that the treasurer of Ripley County should set aside the funds which he has received from back years for all warrants properly certified and such warrants should be paid in the order of their date of presentment and certification.

It is further the opinion of this department that the county treasurer should not ignore the warrants that have been reduced to judgment, but should set aside the money he has received and pay them in their regular order, just as if they had not been sued upon.

APPROVED BY:

Respectfully submitted

ROY MCKITTRICK
Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

COUNTY COURT. Two members are sufficient to transact business.

December 29, 1943

1/11/44
FILED

Honorable George Bales,
Clerk County Court
Grant City, Missouri

Dear Mr. Bales:

Under date of December 22, 1943, you wrote this office requesting an opinion as follows:

"I am writing you as clerk of the County Court of this Worth County, Missouri.

"You are already advised that our county court is comprised of Frank Sego, Presiding Judge, H. F. Holland and E. A. Matthews, Associate Judges.

"Frank Sego, the Presiding Judge, on December 15th, 1943, left here for parts unknown, leaving his family, home and business and under circumstances under which most certainly he will not return and could not continue to be presiding judge if he did return.

"As the remaining members of the County Court and myself understand the law, Section 2477, R.S. 1939, when a vacancy occurs, such vacancy shall be certified by myself to the Governor, who will fill the vacancy, but, of course, we have the question of when this vacancy occurs or whether there is a vacancy. This Presiding Judge has simply left here, and as indicated above, certainly will not return or will not in any event continue to be presiding judge. What the remaining members of the County Court and myself want to know is whether or not the two remaining members of the Court can go ahead and transact the County's business under these circumstances and without the Presiding Judge being here. I have taken this matter up with the

Prosecuting Attorney here, Mr. John Ewing, and also he suggests that I write you for an opinion on this question. You will have in mind also that this is nearing the end of the year, and it is necessary to close this year's business of the County.

"We will appreciate hearing from you promptly. We would like for you to include in this opinion as definitely as you can the powers of the remaining members of the County Court, and what we can do, and how to do it, and also when we are, and how we can determine there is a vacancy. Due to the peculiar circumstances here and the pressing need of action by the County Court, we will appreciate your prompt reply."

Your question regarding the transaction of business by the County Court is answered by Section 2493, Article 13, Chapter 10, which section is as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

Quorum is defined in Webster's New International Dictionary, Second Edition, as:

"Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business. The quorum of the body is an absolute majority of it, unless the authority by which the body was created fixes it at a different number."

December 29, 1943

And the following definition of the word quorum is taken from the Georgia case of Morton vs. Tallmage 144 S.E. Reporter 111:

"Quorum is such a number of the members of a body as is competent to transact business in the absence of the other members."

In regard to when a vacancy will exist, the law is well settled that the power to fill a vacancy does not ordinarily carry with it the power to determine that a vacancy exists. When an officer is once elected and qualified he continues to hold the office for the term to which he was elected unless he dies, resigns or is ousted by a judgment of ouster rendered by a court of competent jurisdiction. Under the exceedingly brief statement of facts in your letter the present presiding judge will continue to hold his office for the term unless he dies, resigns or is ousted.

Conclusion

The two members of the county court have authority to transact business in the absence of the presiding judge and the county clerk should designate one of the associate judges, such designation being entered in the records of the Court.

Respectfully submitted,

W. O. JACKSON,
Assistant Attorney General

APPROVED:

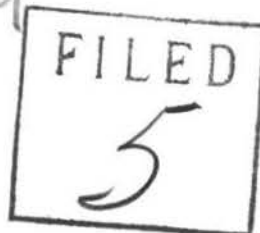
ROY McKITTRICK
Attorney General

WOJ:JK

APPROPRIATIONS: Funds may be appropriated in 1943-44 biennium to cover costs of government in 1945, but total period covered may not exceed two years from passage of appropriations act.

February 16, 1943

2-19
b
Honorable William Barton
State Representative
Montgomery County
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of January 21, 1943, which is as follows:

"May the 62nd General Assembly extend an appropriation into the 1945 biennium provided that such extension does not go beyond the two-year period as set forth in the constitution, of Missouri, Article 10, Section 19, from the final passage and approval of such appropriation for the purpose of paying obligations in part of 1943-44 and the early part of 1945 and within the two-year period for which the appropriation was made?

"If appropriation can be made in this matter and bills created within the two-year period, particularly the first part of 1945, it would expedite matters. I have been unable to find any authority that would prevent appropriations being made in this matter and would like to know if you have any information that will help me in solving this problem.

"An opinion in the light of this inquiry and in answer to my question will be greatly appreciated."

In answering your question, we first look to the history back of the adoption of Section 19 of Article X of the Constitution of 1875. The Constitution of 1865, Article XI, Section 6 (G.S. 1865) provided:

"No money shall be drawn from the treasury, but in consequences of appropriations made by law; and an accurate account of the receipts and expenditures shall be annually published."

Under this provision the General Assembly, in acts providing for the payment of obligations of the state, made continuing appropriations. That is to say, said body in providing compensation for an officer, would appropriate, in the act providing the compensation, a certain sum as a standing annual appropriation.

The 1875 Constitution contains two provisions concerning appropriations. One is Section 43 of Article IV which prescribes the order in which appropriations shall be made. Said section provides in part:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury except in pursuance of regular appropriations made by law. * * * * *"

This section, by itself, in so far as it relates to appropriations made by law, would not seem to materially alter the 1865 provision. However, the other provision of the 1875 Constitution is Section 19 of Article X and that section provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any

other law to fix such sum or object: A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

It will be noticed that the first clause and last sentence of this section are substantially the same as the 1865 provision. But the intervening clauses are entirely new. The intervening clause, that has a bearing upon your question is that providing that no money shall be paid out of the treasury pursuant to an appropriation "unless such payment shall be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act."

The purpose of this clause and the evils it was intended to abolish are stated in State ex rel. Mo. State Board of Agriculture v. Holladay 64 Mo. 526 (1877) where it is said (l.c. 527):

"* * * Because heretofore, owing to the number and variety of special appropriations hidden in numerous and disconnected session acts, and extending during a long series of years, it was next to impossible, even after exhaustive care and research, to ascertain the precise financial status of the state. * * * the evident purpose of * * * (the constitutional provision) was to show once every two years, by a general appropriation act and at one connected view, all sums which the auditor during the next ensuing biennial period could be lawfully called upon to issue his warrant."

The Court further stated (l.c. 528):

"* * * And if any doubt should still linger in the mind on this subject, that doubt will be quickly resolved in favor of the position we have assumed by examination of the debates in the convention which framed the constitution. When speaking of section 19, supra, Mr. Letcher observed: 'In regard to the section,

I desire to say that if I understand the object of it, it is to keep the matter of appropriations close up together. An appropriation made at one time, made we will say today, by law, and no warrant, for instance, issued for that appropriation until two years hence, we find that the State finances would be in such a condition that, unless we put some limit upon this thing, it will be almost impossible to know how the treasury does stand.'

"And commenting on the same section, Mr. Mudd said: 'Now, the object of the committee was to restore to the general revenue the balances of the appropriations not applied at the end of every two years, so that each session of the General Assembly should make appropriations for the term during which they were elected, and not leave these appropriations open to be drawn upon at any time, which have been made by preceding General Assemblies. It was to close up the books at least once every two years, and then if any appropriation be made, let it be made by the General Assembly then in session.'

Also, the court stated (l.c. 527):

"* * * no appropriation possesses any validity, force, or even existence, after the lapse of two years (from the date of its passage)."

Thus we see that the purpose of the constitutional provision was to provide a maximum period of time which could be covered in an appropriation act so that a balance could be struck at least once every two years. Its purpose certainly was not to prevent the General Assembly from covering the full period allowed, if it so desired. If an appropriation act is invalid and of no force after that time, it must necessarily have been valid and in force up until that period has elapsed.

However, some of the language of the opinion of the court, above quoted, is susceptible to being construed to indicate that the court was of the view that appropriations by force of the constitution, lapsed with the beginning of each legislative biennium. For example, in the first excerpt, the court refers to the "ensuing biennial period." And in the second excerpt the comments of Mr. Mudd are that each General Assembly "should make appropriations for the term for which they were elected." The court's comment in the first excerpt, we think, might well be taken to refer to the ensuing two years following the passage of the appropriation act, rather than as a reference to the biennial period for which a member of the House of Representatives is elected. Particularly, should such language be given this construction when considered in connection with the court's statement that "no appropriation possesses any validity, force or even existence, after the lapse of two years (from the date of its passage)."

It is common knowledge that the General Assembly since 1875 never has passed an appropriation act on the first day of its session and therefore, if any effect is to be given that part of Section 19 of Article X, under discussion, no appropriation would lapse, under the Constitution on the first day of a succeeding session of the General Assembly. As a matter of fact, it would be impossible for a General Assembly to pass an appropriation act on the first day of its session, so that it would lapse due to the two-year constitutional limitation, at the beginning of the session of the succeeding General Assembly. This, because of the provision of the Constitution requiring bills to be read on three different days in each house (Sec. 26 Art. IV Mo. Const).

The Constitution clearly permits money to be paid out of the treasury, under an appropriation, at any time within two years of the passage of the appropriation act. It also clearly permits money to be paid out of the treasury, under an appropriation act, after the lapse of two years from the passage of the appropriation act, if the warrant authorizing such payment was issued prior to the expiration of the two-year period. Therefore, there can be no force to the proposition that each General Assembly has the sole right to make appropriations that cover the two-year term for which members of the House are elected. If an appropriation act can cover a maximum period of two years from the date

of its passage, it would always cover a period of time in a succeeding session of the General Assembly.

The remarks of Mr. Mudd, if followed literally, would bring about an impossible situation. Mr. Mudd seemed to be of the opinion that the Constitution required appropriation to lapse at the beginning of each session of the General Assembly. (That seems to us the only conclusion that may be drawn from his statement that each General Assembly should make the appropriations for the term for which they were elected.) Yet the Constitution says that appropriations may be made covering a period of two years from the date of passage of the appropriation act, which period, we have shown will always extend into the period for which members of the House, of a succeeding General Assembly, are elected. Thus, Mr. Mudd's views are directly in conflict with the language of the Constitution, and if followed, require the General Assembly to cover a less period of time in an appropriation act than the maximum period that the Constitution permits. It is further to be noticed, that the court in the Holladay case, stressed by italics, only that part of the remarks of Mr. Letcher and Mr. Mudd, having to do with keeping the appropriations close together and closing the books at least once in every two years. No stress is laid on Mr. Mudd's remarks as to a General Assembly making the appropriations covering the term for which they were elected.

It has been said that remarks made in such Conventions "are not the most trustworthy aids, since these in no wise necessarily represent the views of the majority of the conventions and less certainly reflect those of the people whose votes adopted the constitution but who did not hear the debates." State ex rel. Hiemberger v. Board of Curators 268 Mo. 598, 616.

You have previously been furnished with a copy of our opinion under date of April 22, 1938 to Sam . Trimble. In that opinion reliance was placed on the excerpts, above quoted, from the Holladay case as to what Mr. Mudd said in the convention, to support the statement "that each Legislature controls what money is to be spent during the biennium for which it is elected." The question there presented did not require this determination and we have above demonstrated how such cannot be correct if any meaning is to be given to the provision of the constitution making appropriations valid for the full two years from the date of passage. The appropriation under consideration in the Trimble

February 16, 1943

opinion by its own terms limited the use of the funds appropriated to "the 1937 and 1938" biennium. It was that factor which impelled the conclusion there reached. That appropriation, like all others in the past, only covered the period from the date of its passage to the commencement of the next regular session of the General Assembly - a period of something less than two years.

CONCLUSION

We therefore are of the opinion that the 62nd General Assembly may adopt an appropriation act which would authorize payment of money out of the treasury during the year 1945. Of course, such an act must not, by its own terms, limit the authorization to the 1943-44 biennium, and would only be valid two years from the date of its passage. For example, such an act, if passed on May 1, 1943, would be valid and in full force until the close of the day of April 31, 1945, and even after that date, money could be paid out under such appropriation act, if the warrant therefor was issued prior to the close of the day of April 31, 1945. However, in this connection, consideration would have to be given to some change in Section 13051 R. S. Mo. 1939, and any other similar provisions if they exist.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:AW

SCHOOLS: (1) School boards in common school districts cannot set up two voting places for the election of county superintendent; (2) School boards in city, town and consolidated districts may designate more than one voting place; (3) Counties are not required to provide ballots for election of county superintendent; (4) No special kind of ballot is required, and no one is charged specifically with the duty of furnishing ballots; and (5) School boards should provide blank ballots for use of the voters.

- - - - -

March 5, 1943

Mr. Edward J. Berry
Superintendent of Schools
Iron County
Ironton, Missouri



Dear Mr. Berry:

We have your letter of recent date which reads as follows:

"I have two questions that I would like to ask your opinion on. First, does a school board have the authority to set up two voting places for school elections within a district? Second, does the county have the responsibility of providing ballots for the election of county superintendent? If it isn't mandatory that they provide ballots is there any special kind that has to be provided and who must furnish same?"

We will answer the questions in the order set out in your letter.

I

Does a school board have the authority to set up two voting places for school elections within a district?

You do not state what type of district you inquire about. The law is different as to different types of districts. In a common school district the law provides that the annual meeting of the voters of the district shall be held at the schoolhouse of the district. That law is Section 10418 R. S. Mo., 1939, which reads as follows:

"The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

The above statute is plain and specific and requires that the meeting be held at the schoolhouse. No discretion is left to the directors as to changing the place of meeting, except where there is no schoolhouse in the district.

As to city, town and consolidated districts, Section 10483 R. S. Mo., 1939, controls. That section reads as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tues-

day in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock a. m. and closing at 6 o'clock p. m. of said day. * * * * * Provided, that in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants, in counties containing not less than two hundred thousand nor more than four hundred thousand inhabitants according to the last national census, said elections may at the option of the board be held at the same time and places as the election for municipal officers and in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants in other counties, said elections shall be held at the same time and places as the election for municipal officers, and the judges and clerks of such municipal election shall act as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose. Should such school district embrace territory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory: Provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding 2,000 and not exceeding 100,000 inhabitants. All

Mr. Edward J. Berry

-4-

March 5, 1943

school districts in cities, towns and villages in this state which are now or which may hereafter be under special charter shall hereafter hold their annual school elections on the first Tuesday in April, and the members of the boards of education now serving in such districts shall continue to serve until the first Tuesday in April next following the expiration of the terms for which they were elected or appointed, and until their successors are elected and qualified."

By the foregoing section it will be seen that in city, town and consolidated districts the directors have the power to designate more than one place for voting; except that in certain cities and towns set out in the section the voting places are required to be the same as those whereat municipal officers are voted for.

CONCLUSION

It is, therefore, the opinion of this office that in common school districts the school board does not have authority to set up two voting places for school elections; but that in city, town and consolidated districts the school board does have authority to set up more than one place for voting, except in certain cities and towns wherein the law required that the places of voting be those used by the municipality in its election for municipal officers.

II

Does the county have the responsibility of providing ballots for the election of county superintendent; and if the county is not required to furnish such ballots, is there any special kind of ballot that has to be provided and who must furnish it?

There is no provision in the statute whereby a person can file a declaration as a candidate for the office of county superintendent. Section 10419 R. S. Mo., 1939, provides that in common school districts "The qualified voters assembled at the annual meeting, * * * shall have power by a majority of the votes cast: * * * * * Eighth—To designate their choice, by ballot, for a person to fill the office of county superintendent of public schools."

Section 10610 R. S. Mo., 1939, provides in part as follows:

"At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the clerk of the county court shall mail by registered letter to the president or clerk of the board of school directors of the various districts of the county a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall, so far as practical, conform to the form of poll books set out in section 11490, article 2, chapter 76, R. S. 1939, relating to general elections, and in making the returns of such election, the tally sheets shall be certified by the chairman and secre-

tary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated. * * * * *

From the foregoing sections it will be seen that votes cast for the county superintendent must be by ballot. There is nothing said in either of said statutes as to who shall furnish such ballots. Since there is no provision for a candidate for county superintendent filing his declaration as a candidate, there would be no way to know whose name to put on a ballot if the ballots were prepared. In other words, on the day of election the voters have the right to designate by ballot any person whom they desire to be county superintendent. It would seem, therefore, that only blank pieces of paper should be furnished voters whereon they can designate their choice for that office. Section 10610, supra, provides that the county clerk shall furnish to the districts tally sheets upon which to make returns of the votes cast, but nothing is said as to that officer furnishing ballots. We think this omission of any reference to ballots was because the county clerk would have no way of knowing who was a candidate for the office and for the further reason that the voters would have a right to vote for people who had not declared their

Mr. Edward J. Berry

-7-

March 5, 1943

candidacy for the office of county superintendent.

As a practical proposition, we think that the directors in school districts should prepare blank slips of paper to be passed out to the voters at the annual meeting, so that they could vote on the office of county superintendent, and that in school districts where ballots are printed for voting upon propositions such as the annual levy, blank spaces should be left on the ballots so that the voters could write in the names of their choice for county superintendent.

CONCLUSION

It is, therefore, the opinion of this office that the county is not required to furnish ballots for the election of county superintendent, and that there is no provision in the law for any special kind of ballot to be used in voting for said office, and that the law does not place the responsibility directly upon anyone to furnish ballots for voting for county superintendent. As a practical proposition, we think the school boards should furnish blanks to be used as ballots by the voters of the school district.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:FS

CORPORATIONS: Under House Bill 309 certificate of
shares of stock may be indorsed in blank.

April 23, 1943

v-76



Honorable Frank Benanti
House of Representatives
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion,
under date of April 22, 1943, concerning House Bill No.
309, of the Sixty-Second General Assembly.

Section 1, Pars. (a) and (b) of the proposed bill
reads as follows:

"Section 1. Title to a certificate
and to the shares represented thereby
can be transferred only,

"(a) By delivery of the certificate
indorsed either in blank or to a
specified person by the person appear-
ing by the certificate to be the owner
of the shares represented thereby, or

"(b) By delivery of the certificate
and a separate document containing a
written assignment of the certificate
or a power of attorney to sell, assign,
or transfer the same or the shares
represented thereby, signed by the per-
son appearing by the certificate to be
the owner of the shares represented
thereby. Such assignment or power of
attorney may be either in blank or to
a specified person, or"

Section 1, Article IV of the Constitution of Missouri,
reads as follows:

April 23, 1943

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

Under this section the legislature may enact any law which is not limited or restricted under the Constitution of Missouri. We find no limitation restricting the enactment of a law which sets out the procedure of assignment of shares of stock in a corporation, and it is not a special law as defined under Section 53, Article IV of the Constitution. When enacted by the legislature the procedure of assignment as set out in House Bill 309 of the Sixty-Second General Assembly would be a valid procedure as granted by the Constitution to the legislature.

Section 62 of 5 C. J. sets out the rule of law as to assignments as follows:

" * * * To constitute a valid written assignment at law, where the statute requires an assignment to be in writing, there must be an assignee who takes, and an assignor who gives, title at the time the assignment is made, and both must be named in the instrument; but in equity, even though the name of the assignee is left blank, the instrument will be upheld as an equitable assignment. * * * * * "

Section 72 of 5 C. J. also sets out the following rule:

"A valid assignment of a chose in action evidenced by a written instrument may be made either by a separate writ-

April 23, 1943

ing, or by indorsement on the original instrument. In the absence of statutory authorization, it has been held that the mere indorsement in blank upon a nonnegotiable instrument of the name of the transferor and delivery of the instrument do not constitute a valid assignment; but such indorsement in blank and delivery may constitute a valid equitable assignment if accompanied by other evidence showing an intention to assign, and in many jurisdictions statutes have been passed making nonnegotiable instruments assignable by mere indorsement and delivery so as to authorize the assignee to sue upon them in his own name."

Under the above rule of law, even without a statute as proposed under House Bill 309, supra, an indorsement of the shares of stock in a corporation would be an equitable assignment. (Mowry v. Wood, 12 Wis. 413)

House Bill 309, supra, specifically shows that it is the intention and the purpose of the legislature to allow a transfer of shares of stock in a corporation by an indorsement in blank.

The meaning of the language of the statute is narrowed or broadened to conform to the legislative intent as gathered from its entirety, history and purpose. (Rust v. Missouri Dental Board, 155 S. W. (2d) 80) House Bill No. 309 is plain and unambiguous and shows that it was the purpose of the legislature, if this bill passes, to allow the indorsement in blank of shares of stock in a corporation.

CONCLUSION

It is, therefore, the opinion of this department that the legislature may lawfully enact House Bill No. 309, which specifically allows the indorsement of cer-

Honorable Frank Benanti

(4)

April 23, 1943

tificates and shares of stock in a corporation in blank.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

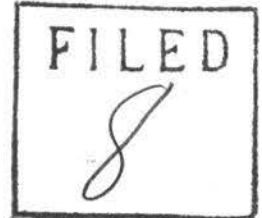
WJB:RW

COUNTY JUDGE:

Can Presiding Judge of the County Court act for the county in selecting, for county depository, and lending agent on county warrants, a bank in which he is cashier, director and stockholder?

March 30, 1943

4-5



Honorable J. A. Bishop, Associate Judge
County Court of Pemiscot County, Box 212
Steele, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 23rd in which you request an opinion as to whether or not a presiding judge, as such, may enter into a contract with a bank in which he is also cashier, director and stockholder. The text of your letter, set out in full, is as follows:

"I am associate judge of the County Court of Pemiscot County, Missouri. Charles W. Reed of Hayti, Missouri, is the other associate judge. A. B. Rhodes of Caruthersville was recently appointed by the Governor to fill out the unexpired term of J. H. McFarland, deceased.

"A. B. Rhodes, the presiding judge, is cashier, a member of the Board of Directors, and a stockholder in the National Bank of Caruthersville. The First State Bank of Caruthersville is the present county depository, but as you know, the matter of selecting a county depository will be up for decision again in May of this year. Furthermore, we are required to immediately borrow some funds on warrants for state institutions, because you know the state will not accept warrants. The National Bank of Caruthersville will likely make application to furnish money on these county warrants, and will also likely be one of the bidders for the county funds at the May letting of the funds.

"The question has arisen as to whether or not A. B. Rhodes, as presiding judge, and as cashier, director and stockholder of the National

Bank, can act for the county in the selection of the National Bank as a county depository and as lending agent on county warrants. This subject is controversial here and I cannot determine from local advice as to my rights and duties in this matter. The attorneys that we usually call upon for such advice are the attorneys for the First State Bank, and for that reason I would prefer not to have them pass on this question.

"Will you please give me your opinion on these matters at your earliest convenience. There has been called to my attention Section 2491, R. S. Mo. 1939, and the case of Githens vs. Butler County, 165 S.W. (2d) 650."

An examination of the statutes of the State applying to the particular set of facts in your letter would seem to include the following, Section 2491, R. S. Mo. 1939:

"Judges prohibited from doing certain things - No judge of any county court in the state shall, directly or indirectly, become a party to any contract to which the county is a party, or to act as any road or bridge commissioner * * * * *". Nodaway County v. Kidder 129 S. W. (2d) 857, 344 Mo. 795; Githens v. Butler County 165 S. W. (2d) 650.

Section 2492, R. S. Mo. 1939 provides:

"Penalty for violating preceding section - Any judge of the county court who shall violate any of the provisions of the next preceding section, or who shall do any of the acts or enter into any of the contracts prohibited or declared unlawful in said section, shall be punished by a fine not exceeding one thousand dollars for each offense, or

by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Section 4484, R. S. Mo. 1939, provides:

"Certain acts of county courts misdemeanors - No judge or justice of any county court in this state shall, either directly or indirectly, become a party to any contract to which such county is a party, or act as any road or bridge commissioner, either general or special, or as keeper of any poor person, or as director in any railroad company in which such county or any township, part of township, city or incorporated town therein is a stockholder, or act as agent for the subscription of any stock voted to any railroad by any county or subdivision thereof; any such judge or justice who shall violate any of the provisions of this section shall be adjudged guilty of a misdemeanor."

Turning to the interpretation of the powers of the county court and the judges thereof, in the decisions of the State we find the following language used in the cases cited below.

County courts are only agents of county with no powers except those which may be granted by law, and, like all other agents, they must pursue their authority to act within the scope of their powers. *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87, *Walker v. Linn County*, 72 Mo. 650.

Where a county court transcends its statutory powers, its acts cannot be supported on the ground that mere irregularities in proceedings of the court will not invalidate its acts. County courts are not the general agents of the state, but their powers are limited and defined by law, and their acts outside of their statutory authority are void. *Sturgeon v. Hampton*, 88 Mo. 203.

At the outset there are two matters to be taken into consideration. First, the position of a judge of a county court and his responsibility and relationship as a municipal officer to the inhabitants of a county which he represents, and second, as in this instance, his position as an officer and his position as a managing director of a corporation to his stockholders, other officers and patrons of his institution. The relationship of an officer of a corporation is quite clearly set out and defined, and it is axiomatic that the directors of a corporation occupy a fiduciary relationship to the corporation which they manage and control and thus interested therein. They are, in a broad sense, trustees. On this subject of fiduciary relations your attention is directed to the decisions in the State on this subject, and I quote:

"Corporation's directors occupy fiduciary relation to corporation and stockholders, and may not profit by virtue thereof at expense of corporation or rights of stockholders." *Bromschwig v. Carthage Marble & White Lime Co.*, 66 S. W. (2d) 889, 334 Mo. 319.

"Directors and other officers, while not 'trustees' in a technical sense of the term, occupy a fiduciary relation to corporation and to stockholders as a body." *Punch v. Hipolite Co.*, 100 S. W. (2d) 878, 340 Mo. 53.

"President of corporation occupied fiduciary relationship to company and to its stockholders." *Southwest Pump & Machinery Co. v. Forslund*, 29 S. W. (2d) 165, 225 Mo. App. 262.

"Relationship existing between corporation and its officers is one of trust and confidence and officers cannot use official positions for benefit of any one other than corporation." *Frankford Exchange Bank v. McCune*, 72 S. W. (2d) 155.

Hill v. Gould, 30 S. W. 181, 129 Mo. 106;
Grand Co. v. Palladun, 287 S. W. 438, 315

Mo. 907.

Bent v. Priest, 10 Mo. App. 543,

Ford v. Ford Roofing Co., 285 S. W. 538.

46 C. J. 1037 at paragraph 308: "A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit, and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it. Where two boards are created by statute, one having power to make appointments to another and to supervise its actions, it is illegal for the first board to appoint members of the first board to the second board.

"In the discharge of his duties the officer must be disinterested and impartial, and he cannot at the same time act in his official capacity and as the agent of one of the public whose interests are adverse to those of another.

"Statutes prohibiting public officers from having an interest in contracts executed in their official capacity are declaratory of the common law. Such a statute applies to municipal as well as other public officials. A statute making it unlawful for any officer, either elective or appointive under the constitution, to become interested in any contract in the making of which he may be called upon to vote includes not merely constitutional officers but all officers who fall under the provisions of the constitution. An office is a lucrative one, to

which any salary, compensation, or fees are attached, regardless of the amount, within a statute prohibiting a person holding a lucrative office from being interested in certain stated contracts."

Turning now to the current decisions in our courts bearing on this particular subject, your attention is invited to Nodaway County v. Kidder, 129 S. W. (2d) 857, l. c. 860-861:

"Section 2089, R. S. Mo. 1929, Mo. St. Ann. Section 2089, p. 2663, provides, 'no judge of any county court in the state shall, directly or indirectly, become a party to any contract to which such county is a party, or to act as any road or bridge commissioner, either general or special * * *.' The succeeding section provides a penalty by a fine or jail imprisonment for the violation of said section.

"The alleged agreement between appellant and the county court, of which appellant was a member, was void under the express terms of the statute.

* * * * *

"In the case of Boyd County v. Arthur, 118 Ky. 932, 82 S. W. 613, 614, 26 Ky. Law Rep. 906, the fiscal court of said county had appointed each of its members to supervise the construction and maintenance of roads in his district and fixed an allowance of \$3 per day. A statute prohibited a member of the court from being interested in a contract with the county. The court said: 'The members of the fiscal court are the representatives of the county charged with the duty of protecting its interests. * * There is no principle better settled than that a trustee will not be allowed to occupy a dual position, and that, where he is charged with the protection of his

cestui que trust, he cannot place himself in a position where his personal interests may be antagonistic to the interests of the cestui que trust. If he does this, it is a breach of his trust. The statutes we have referred to have the same end in view when they forbid the members of the fiscal court being interested in any contract or work, and in providing that they may appoint one supervisor for the whole county and exercise supervision over him.' The court held: 'The fiscal court has no authority to allow its members any other compensation than that fixed by law.'

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. *Town of Carolina Beach v. Mintz*, 212 N. C. 578, 194 S. E. 309; 46 C. J. 1037 Sec. 308."

The most recent decision in which this same subject has been treated may be found in *Githens v. Butler County*, Mo. 165 S. W. (2d) 650, 1. c. 652:

"* * * The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 *Williston, Contracts*, Sec. 1735, p. 4895. The basis of this common law rule is that it is against public policy (*State ex rel. Smith v. Bowman*, 184 Mo. App. 549, 170 S. W. 700) for a public official to contract with himself. 'At common law and generally under

statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of (or) council. * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial * * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, sec. 773; 46 C. J., sec. 308; 22 R. C. L., sec. 121; State ex rel. Streif v. White, Mo. App., 282 S. W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S. W. (2d) 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857.

"This basic and fundamental common law concept has been enacted into our statute law relating to county courts. Mo. R. S. A., sec. 2491 provides that:

"No judge of any county court in the state shall, directly or indirectly, become a party to any contract to which such county is a party, * * * ."

"The next section of the statute makes the violation of the statute a misdemeanor. Mo. R. S. A., sec. 2492.

"The cases cited in the preceding paragraphs deal with instances of an official being

'directly' interested in the contracts, actions or dealings with the public body of which he was a member. Here the question is whether the public official is so 'indirectly' interested as a party to a transaction with a county court of which he was a member as to invalidate it. In fact the question is whether the relationship of husband and wife is a disqualifying interest within the meaning of the statute and common law prohibition against an official's becoming indirectly interested in a public contract. The two opposing lines of cases are collected in the following: Thompson v. School Dist. No. 1, 252 Mich. 629, 233 N. W. 439, 74 A. L. R. 792; O'Neill v. Auburn, 76 Wash. 207, 135 P. 1000, 50 L. R. A., N. S., 1140; 6 Williston, Contracts, p. 4898."

Turning now to current thought and other jurisdictions touching upon the same subject we find Hayes v. Thornsbrough, 180 Okla. 357. In this decision Hurst, J., speaking states:

"In Lewis v. Schafer (1933) 163 Okla. 94, 20 P. (2d) 1048, this court, in finding a fiduciary relationship to exist between an employer and his employee, stated the rule thus:

"The question as to whether a fiduciary relationship existed is to be determined wholly upon the record facts therein. The courts have generally refrained from defining the particular instances of fiduciary relationship in such manner that other and new cases might be excluded. The expression 'fiduciary relationship' is one of broad meaning, including both technical relations and those informal relations which exist whenever one man trusts and relies upon another. Reeves v. Crum, 97 Okla. 293, 225 P. 177."

"We do not hold that the office of county judge of itself places the judge in a position of trust and confidence in all of his personal transactions during his term of office. But it is an element strongly to be considered in reaching that conclusion, and this is particularly true where he deals with persons living in his county and who are interested in matters pending in the court over which he customarily presides. The office of county judge itself signifies trust and confidence, as he deals generally with estates of minors, incompetents, and deceased persons inquiring his protection and guidance."

Dawson v. National Life Insurance Company of America, 176 Iowa 362:

Ladd J. - "A fiduciary relation exists between a managing officer of a corporation and a stockholder with relation to the stockholder's shares of stock, and any contract between them by which such officer acquires profit out of such shares to the detriment of such stockholder is presumptively fraudulent and voidable, and the burden is on such officer to rebut such presumption by an affirmative showing that said contract was fairly procured for value, or, if obtained for less than value, that it was procured upon full disclosure of all facts bearing on value known to such officer and unknown to the stockholder.

* * * * *

"The authorities are agreed that the officers and directors of a company are trustees of the stockholders in many respects, as in the transaction of the business and care of property of the corporation, but there is a conflict as to whether any fiduciary relation exists between them concerning the shares of capital stock. One line of cases, while recognizing that the

directors and managing officers are trustees for the shareholders in some respects, limit these strictly to matters appertaining to the management of corporate affairs, and say that dealing with the individual shareholder concerning his shares of capital stock is not within the scope of the trust relation, and that, as director or officer, he is charged with no duty to the stockholder with reference to his shares; in other words, the matter of buying from or selling to the stockholder capital stock in the corporation is wholly without the scope of his agency as director or managing officer thereof. Board of Commissioners of Tippecanoe County v. Reynolds, 44 Ind. 509 (15 Am. R. 245); Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; O'Neile v. Ternes, 32 Wash. 528 (73 Pac. 692); Haarstick v. Fox, 9 Utah 110 (33 Pac. 251); Crowell v. Jackson, 53 N. J. L. 656 (23 Atl. 426); Walsh v. Goulden, 130 Mich. 531 (90 N. W. 406); Hooker v. Midland Steel Co., 215 Ill. 444 (106 Am. St. 170); Bawden v. Taylor, 254 Ill. 464 (98 N. E. 941); Grant v. Attrill, 11 Fed. 469; Gillett v. Bowen, 23 Fed. 625; Harverland v. Lane (Wash.), 154 Pac. 1118; 1 Cook on Corp. (7th Ed.), Sec. 320; 2 Machen on Corp., Sec. 1637; Bower on Actionable Non-Disclosure, Secs. 138, 308; Cooley on Torts (3d Ed.) p. 991."

2 Bouvier's Dictionary, 1217:

"What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Appeal of Watts, 78 Pa. 392."

CONCLUSION

From the above and foregoing, the conclusion arrived at is this. The presiding judge of a county court is prohib-

Hon. J. A. Bishop

-12-

March 30, 1943

ited by statute from entering into a contract as an officer of a political subdivision with himself as cashier and director of a private corporation in which he is personally interested.

Regardless of the statutory provision such a contract entered into is void as being against public policy. When the relations between the contracting parties are such as to render it certain that they do not deal on terms of equality, but that either, from superior knowledge, derived from his peculiar relationship in the private corporation, and as an officer of a political subdivision of the State, this places him in an unfair advantage concerning the proposed transaction.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED BY:

ROY MCKITTRICK
Attorney General of Missouri

LIM:jn

County Clerk
COUNTY OFFICERS:

County clerk has duty of performing ministerial acts in the management of county school fund mortgages.

August 18, 1943

8/26



Hon. Virgil H. Black
Treasurer and Ex-officio Collector
Daviness County
Gallatin, Missouri

Dear Mr. Black:

The Attorney-General wishes to acknowledge receipt of your letter of August 14, 1943, in which you request an opinion of this Department. Your opinion request, omitting caption and signature, is as follows:

"I want an opinion as to whether the employment by the County Court of the undersigned, County Treasurer and Ex-Officio Collector of Daviness County, to check on the school loans belonging to the County and Township School Funds, as to taxes, insurance, interest, rent the properties taken over--or in other words keep these loans up to date, as in a bank, at which I have had 16 years experience, at a salary of \$25.00 monthly, is there anything incompatible or against the public policy in this extra employment. Sure would earn the money and it would be money well spent by the court.

"As I hold the two offices--would both or either of them fit the place."

We do not construe your problem as containing the question of incompatibility of two offices. It is primarily a question of what person or office has the responsibility for the administering of the duties as required by law relative to the county school fund loan.

The county courts of the several counties in the State of Missouri have the duty of managing the county school funds and to make loans therefrom. This duty is given the county courts in Section 10376, R. S. Mo. 1939, which provision is as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Of course, the county court in this State is a court of record, and the officer having custody, charge and control of the records of such court and having the duty of keeping such records, is the county clerk. It is undoubtedly common knowledge that the county clerk waits upon the court and either he or his deputies keep the minutes of its meetings.

We also wish to call to your attention Section 13295, R. S. Mo. 1939. This section of the statutes deals generally with the duties of the clerks of all the courts of record, which, of course, necessarily includes the county clerks of the various counties. The provisions of the aforesaid section are as follows:

"Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same; Provided, that where the clerk of the circuit court is a party, plaintiff or defendant (whether singly or jointly with others) to a suit or action, the writ of summons and all other process shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said latter named clerk shall, on the trial of said cause, act as temporary clerk of the circuit court and otherwise perform in said cause all the duties of the circuit clerk."

The above quoted section is self explanatory and we feel demonstrates that it is the duty of the county clerk to perform the duties above which you speak of in your request for an opinion. However, we wish to further cite you the provisions of Section 13823, R. S. Mo. 1939. This section refers to the duty of the county clerk to keep all of the accounts due the county. Due to the length of this particular section of the statute we will only refer you to that part of the section which is of interest in this opinion. Said pertinent part is as follows:

August 18, 1943

"* * *; second, to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; * * *"

From the authorities cited above we feel that it is clear that the duty "to check on the school loans belonging to the County and Township School Funds, as to taxes, insurance, interest, rent the properties taken over--or in other words keep these loans up to date," as stated in your request, is the duty of the county clerk, which duty is imposed upon him by the aforesaid statute.

Could we then say that the county court could employ and pay another person to perform the duties of an officer who is already under direction by statute to perform such duties and who receives compensation therefor? We think not. It is a familiar rule of law that a county court may not expend moneys of the county, unless they are specifically authorized so to do by the statute, or unless the expenditure is incidental to the performance of the duty which is prescribed by law. The county court is directed by law to take charge of the administration and loaning of school fund moneys and the county clerk is compensated for the ministerial acts pertaining thereto. Therefore, it would be outside the authority of the county court to pay any person to attend to these duties, other than the county clerk.

In view of the foregoing it seems unnecessary to pass upon the question of the incompatibility of the offices of treasurer and ex officio collector and the office of deputy county clerk. We specify "deputy county clerk" for the reason that we feel the only persons qualified to perform the duties set out in your letter, are the county clerk and his deputy. Even if a person holding the office which you now hold could be appointed deputy county clerk, the county court could not under the law pay an additional fee to such deputy county clerk for the duties which you have set out in your request for an opinion.

August 18, 1943

Conclusion

Therefore, it is the opinion of this Department that the duty as set out in your request for an opinion, is one which is placed upon the county clerk and which should not be performed by any other officer; further, that the county court has no authority to appoint a treasurer and ex officio collector to perform any part of the duties of the county clerk of any county.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

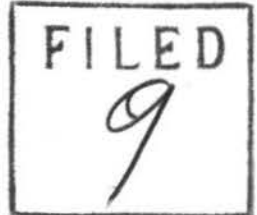
MUNICIPAL CORPORATIONS:

TAXES:

Special tax bills against county
for street improvements.

August 24, 1943

8/24



Hon. F. H. Black
Judge of the County Court
Pulaski County
Brownfield, Missouri

Dear Sir:

We are in receipt of your letter of August 16, last,
requesting an opinion of this office, which letter is as
follows:

"May I have your official opinion upon the
following proposition:

"The City of Waynesville, a city of the
fourth class, and the county seat of
Pulaski County, propose to pave the street
abutting on two sides of the court house
square. They have made demand upon the
county court for payment of one-half the
cost of the improvement and indicate that
unless such is paid by the county court,
that the City will issue special tax bills
for said improvement. I presume the City
relies upon sections 7226 to 7228 R. S.
Mo. 1939, for their authority to issue such
special tax bills against the county.

"Has the City authority to issue special
tax bills against Pulaski County for the
indicated improvement?"

Section 7226, R. S. Mo. 1939 is as follows:

"All real estate owned by a county and
situate within the corporate limits of
any city of the fourth class shall be
subject to the provisions of all ordi-
nances of such city which relate to
the erection and maintenance of hitch-
ing posts, sidewalks, guttering, curb-
ing, fences along streets and alleys,

and the paving and macadamizing of streets to the same extent as that of private citizens of such city."

In the case of City of Edina, etc. vs. School Dist. et al., 267 S. W. 112, 1. c. 116, the Supreme Court of Missouri, en banc, held that the real estate of a county in cities of the fourth class is subject to special tax bills for improving streets. In so holding the Court declared the law to be as follows:

"The real estate of a county in cities fourth class is by section 8526, R. S. 1919, expressly made subject to special tax bills for improving streets the same as that of individuals. Section 8527 makes it the duty of the county court after 60 days' notice of the improvement is served on the county clerk to make such improvements and pay for same out of its general fund. By section 8528, if the county court failed to do so, the city could proceed to make such improvement and issue tax bills for the cost thereof, which 'shall be a valid claim' against the county and which the county court shall pay out of its general fund."

Section 7227, R. S. Mo. 1939 is as follows:

"It shall be the duty of the county court whenever any of the improvements of the property set out in section 7226 is required by ordinance, to forthwith make such improvement fronting or abutting any real estate owned by the county and lying within the corporate limits of the city, and included in the terms of the ordinance, in compliance with the provisions of such ordinance, and pay for such improvements out of the general fund of the county."

The procedure of the court to make improvements is set out in Section 7228, as follows:

"If the county court shall fail, neglect or refuse to comply with the provisions of any ordinance providing for the improvement of property as herein provided, for a period of sixty days after notice

August 24, 1943

has been served on the county clerk, of the requirements of the ordinance and the kind and nature of the improvements to be made, the city shall proceed to make such improvements in the same manner as is provided by ordinance for the making of similar improvements by private citizens, and shall issue special tax bills for the cost of all labor and material necessary in making such improvements, and such special tax bills shall be a valid claim against such county, and it shall be the duty of the county court at its next regular meeting after the completion of said improvements to audit, allow and pay out of the general fund of the county the cost of making said improvements or the special tax bills issued therefor."

CONCLUSION

From the plain language of the statutes above quoted, it is the opinion of this department that upon failure of the county to comply with the provision with an ordinance providing for the improvement of property mentioned in said statutes within sixty days after notice, the city has authority to issue special tax bills for such improvements.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:jc

PROBATE COURTS: Instructions to jury should not be given by probate judge.

April 20, 1943



Hon. A. J. Bolinger
Judge of the Probate Court
Versailles, Missouri

Dear Judge Bolinger:

We acknowledge receipt of your letter of April 6, wherein you request an opinion from this department. Your letter is as follows:

"Please give me your opinion whether or no, in light of what is said in Davis v. Johnson, 58 S. W. (2d) 748, it is proper for a Probate Judge to give a jury instructions in the like manner as instructions to a jury in Circuit Courts."

The case of Davis v. Johnson, referred to in your letter did not involve the question of giving instructions to a jury in a probate court, however, the court did hold as a general proposition that in practice, when not otherwise provided, the probate court may borrow from the code. In so holding, the court stated:

"The procedure authorized by those statutes 'is a summary and quick method of bringing property into the estate. The probate court is a court of record, and in practice, when not otherwise provided, may borrow from the Code.' Clinton v. Clinton, 223 Mo. 371, 338, 123 S. W. 1, 5.
* * * * *

In the case of Clinton v. Clinton, cited in the above quotation, the issue was not whether or not a probate judge should give instruction to the jury in the probate court, but involved only a question of pleading. In holding that a reply to the interrogatories should be permitted, the court held:

"We concur in all that he has said in his opinion. We believe that property rights are to be tried in such cases. It is a summary and quick method of bringing property into the estate. The probate court is a court of record, and in practice, when not otherwise provided, may borrow from the Code. Whilst perhaps in the case at bar it was not necessary for a reply to be filed to the answers of the interrogatories, and the cases seem to indicate that the issues to be tried were upon the interrogatories and the answers thereto, yet we are of the opinion that to sharpen and shorten the real issues a reply should be permitted."

Section 66, Revised Statutes of Missouri, 1939, provides that:

"The issue upon the interrogatories and answers thereto shall be tried by a jury, or if neither of the parties require a jury, by the court, in a summary manner, * * * * *"

Section 200, Revised Statutes of Missouri, 1939, providing for the trial of issues founded upon demands in the probate court, provides that the trial shall be "conducted in a summary manner" before the court, or before a jury if one is required.

Section 447, Revised Statutes of Missouri, 1939, providing for inquiries on sanity, provides that the probate court:

"* * * * * shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Section 1118, Revised Statutes of Missouri, 1939, being the provision of the code with reference to instructions, is as follows:

"When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence; which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case."

It will be noted that, except in insanity proceedings, the statutes, authorizing trial by jury in the probate court, provide that it be "conducted in a summary manner." In discussing the law concerning the proceedings in discovering assets in the probate court, the Kansas City Court of Appeals in the case of *In Re Parker's Trust Estate*, 67 S. W. (2d) 115, 1. c. 119, held:

"However, the further proceedings were not according to the course of the common law and constituted a form of trial disregarding the established course of proceedings, and, being summary in character, were such as required an express statute for their exercise. This seems to be the accepted view. 60 C. J. 1014; *Cohen v. Atkins*, 73 Mo. 163, loc. cit. 166; *Gunn v. Sinclair*, 52 Mo. 327, loc. cit. 332; *Nolan v. Johns*, 27 Mo. App. 502, loc. cit. 508; *Keary v. Baker*, 33 Mo. 603, loc. cit. 612. When such proceedings are authorized they are governed wholly by the provisions of the statutes authorizing them; and, in the prosecution of

such, the provisions of such statutes, being in derogation of common right, must be strictly complied with. Owens v. Andrew County Court, 49 Mo. 372, loc. cit. 378; Judson v. Smith, 104 Mo. 61, 15 S. W. 956; 60 C. J. 1015. * * * * *

In the case of Central Republic Bank & Trust Co. et al., v. Caldwell et al., 58 Fed. Rep. (2d) 721, l. c. 731, the court held:

"The main characteristic differences between a summary proceeding a plenary suit are: The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal pleadings. In the former, the necessary parties are cited in by order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had.

"It is apparent that the differences are largely procedural rather than substantive.*
* * * *

In the case of Canepari v. State, 89 S. W. (2d) 164, (l. c. 165), 169 Tenn. 472, the court said:

"Summary proceedings' is a form of trial in which the established course of legal proceeding is disregarded, especially in the matter of trial by jury."

Probate courts are of statutory, and not common law origin, and all proceedings in the probate court must be founded upon the statutes. Except in insanity proceedings, the statutes specifically provide that the proceedings shall be summary, and, therefore, when the requirements of the statutes providing for the procedure are satisfied, any other procedure would be superfluous and without legal foundation. It seems that the court, in holding that the general code may be referred to for proceedings in a probate court, meant that the general code could be called upon only in cases where proceedings in the probate court would be incomplete and could not be exercised without such authority.

One of the most persuasive facts against the probate judge giving instructions to a jury is that the law does not require that he be learned in the law. Section 1983, Revised Statutes of Missouri, 1939, is as follows:

"Every judge of the supreme court and of the several courts of appeals shall be a citizen of the United States, not less than thirty years old, and shall have been a citizen of this state five years next preceding his election or appointment, and shall be learned in the law. Every judge of the circuit court shall be not less than thirty years of age, shall have been a citizen of the United States for five years, a qualified voter of this state for three years next before his election or appointment, and shall be learned in the law. Every judge of probate and of a county court shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election; and every judge of any court of record shall be commissioned by the governor, and, whether elected or appointed, shall hold his office until his successor is elected and qualified."

Hon. A. J. Bolinger

-6-

April 20, 1943

CONCLUSION

It is, therefore, the opinion of this department that it is not proper for a probate judge to give a jury instructions in like manner as instructions are given to juries in circuit courts.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

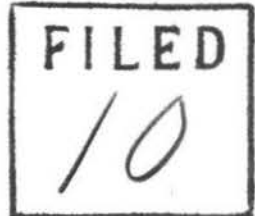
APPROVED:

ROY MCKITTRICK
Attorney General

LAP:NS

COUNTY COURT: Court, in its discretion, may allow fee to sheriff, involving use of an ambulance in transporting insane county patient to state hospital.

July 24, 1943



Mr. C. R. Bothwell, Sheriff
Pettis County
Sedalia, Missouri

Dear Sheriff Bothwell:

This will acknowledge receipt of your letter of recent date which, omitting caption and signature, is as follows:

"I would like to have your opinion on the following: Where the Sheriff conveys a patient to the hospital at Fulton, Missouri, and is compelled to use an ambulance to make the trip on account of the physical condition of the patient. Who pays the expenses of the ambulance, the Sheriff or the County? In other words is the Sheriff entitled to his regular mileage besides the cost of the ambulance.

"I get \$17.20 for a trip to Fulton and if I pay the expenses of the ambulance which is \$15.00 I only make \$2.20 out of the trip. This is what the County Court wants to allow me for this kind of trip. * * * * *

Section 4342 R. S. Mo., 1939, is devoted to the statement that there is a penalty against an officer for the exaction of fees to which the officer is not entitled. It is the obvious intention of the Legislature to set out in detail the specific fees and the amount thereof allowed various officials in discharging the official duties. It is seen, therefore, that unless specifically allowed by

July 24, 1943

statute no fee may be charged by an officer for his services. We further direct your attention to the case of Smith v. Pettis County, 136 S. W. 2d 282, 1. c. 285, from which the court discusses the right of a public official to compensation for the performance of any duty, and in the discussion we find this language:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup. 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * * "

Turning now to those sections of our statutes which concern the county court and the power to send to state hospitals their insane poor, we find at Section 9328 R. S. Mo., 1939, a provision that the county court shall have power to send to the state hospitals such of their insane poor as may be entitled to admission thereto.

Section 9339 R. S. Mo., 1939, provides that the county court may, upon a hearing, cause a suitable order to be entered of record sending an insane poor patient to a state hospital. Such order shall further set forth that the person found to be insane is a fit subject to be sent to the state hospital, and the clerk of the court forthwith shall forward a certified copy of said order to the superintendent of the hospital, accompanying the same with the request of admission of the person found to be insane to the hospital.

Section 9341 R. S. Mo., 1939, provides that the clerk of the county court shall issue a warrant to the sheriff of the county, or any other suitable person, commanding the ar-

rest of the insane person and directing that the patient be conveyed to a designated state hospital. This section further provides that if the clerk be satisfied of its necessity he, the clerk, may authorize one or more assistants to be employed to assist in conveying the person on the point of arrest to the designated hospital. Section 9342 R. S. Mo., 1939, provides that the relatives of an insane person may have the right to convey the patient to the hospital.

Section 9355 R. S. Mo., 1939, reads as follows:

"To the Sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and \$1.00 per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, \$4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled: Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county.

Directing your attention now to Chapter 55, Article 3, Sections 9590 to 9601, inclusive, which sections concern themselves with the support of the county poor, we find this

July 24, 1943

language particularly at Section 9590:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants. "

We also quote Sections 9593 and 9594, respectively, as these sections seem to apply in this instant case:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

"The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

CONCLUSION

It is, therefore, the opinion of this department that the sheriff or other suitable person designated by the county court for the purpose of transporting an insane poor patient to a state hospital under direct order of the county court is entitled to mileage at the rate of ten cents per mile each way from the place of arrest to the state hospital by the nearest

July 24, 1943

route usually traveled. In addition, he is entitled to One Dollar (\$1.00) per day for support of patient on the way to or from the hospital, provided the clerk of the court is satisfied of its necessity. The clerk may also authorize one or more assistants to be employed to assist the sheriff or other person delegated to transport the patient. The assistant, or assistants, shall receive Four Dollars (\$4.00) per day for time actually consumed in accompanying sheriff, this said sum to include all the expenses of the assistant or assistants. The sheriff, or other person designated, shall furnish all necessary means of transportation in taking a patient from the point of arrest to the hospital.

The fees and compensations shall be paid out of the county treasury of the county sending the patient to the state hospital. Furthermore, no specific statute authorizes payment of ambulance fees by the county court. However, the court may, in its discretion, under Section 9593, "provide, at the expense of the county, for the relief, maintenance and support of such persons." And further, the county court in providing for an ambulance for an insane poor person is exercising the discretion allowed under statutes above quoted.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:FS

OFFICERS: Oath of office to a member of the County Court may be administered in any state
OATH OF OFFICE: by any person authorized to administer oaths.

January 6, 1943

Mr. Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the following facts and question:

"This is to advise that the newly elected Presiding Judge of the Phelps County Court is in another State, out in the east, seriously ill and incapable of getting back to this State and County to qualify and take the oath of office. It has been suggested by some of his friends that the Commission might be sent out to him, for him to sign and take the oath of office before someone out there capable of administering oaths, and that he might qualify in that manner. However, there are indications that his right to qualify in that manner may very probably be challenged, many contending that the old Presiding Judge should hold over until the next election, in the event the newly elected Judge fails to return to Missouri and qualify before the County Clerk as ordinarily done."

Section 6 of Article XIV of the Constitution of Missouri provides as follows:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their re-

spective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

Under Section 2475, R. S. Mo. 1939, judges of the county court are elected. This section also provides that such judges shall hold their office for a certain period of time therein named and until their successors are elected and qualified.

Section 2478, R. S. Mo. 1939, provides as follows:

"The clerks of the county courts shall certify to the governor the names of the persons elected as county judges, and the governor shall thereupon commission all such persons as judges of the county courts for the respective terms for which they may have been elected."

We find nothing in the statutes relating to the oath of office to be taken by the judge of the county court, however, the foregoing constitutional provision makes this provision.

Under Section 1 of Article IV of the Constitution of the United States it is provided as follows:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. * * * * *

Under this section we might say that provisions are made for the State of Missouri to give full faith and credit to oaths administered in other states. However, we think your question is directly answered by the provisions of Section 1885, R. S. Mo. 1939, which is as follows:

"Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

It will be noted that this section does not limit to the State of Missouri the place in which an oath or affidavit may be administered. Since the law pertaining to judges of the county court, the constitutional provision and the statute first hereinabove referred to, do not limit the place in which an oath may be administered, then it follows that oaths or affidavits may be administered by the proper officer in any county or state in which such officer has jurisdiction.

CONCLUSION

It is, therefore, the opinion of this department that a person who is elected to the office of judge of the county court in this state may take the oath of office before any person capable of administering oaths, either within this state or without the boundaries of the state.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

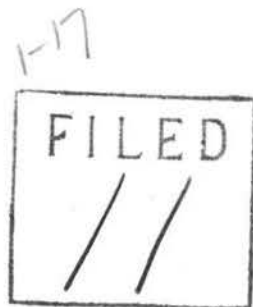
TWB:CP

RECORDERS OF DEEDS - CORPORATIONS:

Articles of agreement should be filed and not recorded in the office of the recorder of deeds.

January 11, 1943

Honorable D. W. Breid
Prosecuting Attorney
Franklin County
Union, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion, under date of January 8, 1943, which reads as follows:

"We have a matter in dispute here and would like your opinion on same. The Tri-County Bus Company, Inc., filed their certified copy of the certificate and articles of association with the Recorder of Deeds, who promptly recorded it and returned the original to the President of the bus company, who returned same and directed the Recorder to keep it on file in the Recorder's office. As I interpret Section 5339, it is my opinion that after recording the articles should be returned to the President or Secretary of the corporation. There seems to be a difference of opinion among the attorneys and I would like to know what should be done with the certificate and articles of association, whether to keep them on file in the Recorder's office or return them to the corporation."

Section 5339 R. S. Missouri, 1939, reads as follows:

"The articles of agreement in duplicate shall be signed and acknowledged and sworn to by all the parties thereto, including the parties selected as directors or managers for the first year, before some officer having a seal. Each copy of the articles shall be filed in the office of the secretary of state, one of which shall be retained by him as a permanent file. The secretary of state shall give a certificate that said corporation has been duly organized which shall set forth the amount of its capital stock, the period of the existence and its permanent place of location and a certified copy of such certificate shall be attached to the other copy of the articles of association so filed with the secretary of state and by him delivered to the incorporators which shall by them be filed in the office of the recorder of deeds of the county or city in which the corporation is to be located: Provided, that no subsequent amendment of the articles of agreement, which is expressly authorized by law, shall take effect until same, in due form, has been so filed in duplicate, certified and recorded as hereinbefore provided; and provided further, that in the increase of the capital stock of any corporation, the same proceedings shall be had, so far as practicable, as in the original proceedings for incorporation."

In construing statutes, and in order to ascertain the purpose of a statute, it must be considered historically. (Cummins et al vs. K. C. Public Service Company, et al, 66 S. W. (2d) 920.)

Prior to its amendment in 1927, Section 5339, supra, read as follows:

"The articles of agreement shall be signed and acknowledged and sworn to by all the parties thereto, including the parties selected as directors or managers for the first year, before some officer in the state of Missouri having a seal, and recorded in the office of the recorder of deeds of the county or city in which the corporation is to be located, and a certified copy of such recorded instrument shall be filed in the office of the secretary of state: Provided, that no subsequent amendment of the articles of agreement, which is expressly authorized by law, shall take effect until same, in due form, has been so recorded and certified, and sworn to as hereinbefore provided; and provided further, that in the increase of the capital stock of any corporation the same proceedings shall be had, so far as practicable, as in the original proceedings for incorporation."

As amended in 1903, the section read as follows:

"The articles of agreement shall be signed and acknowledged by all parties thereto, and recorded in the

office of the recorder of deeds of the county or city in which the corporation is to be located; and a certified copy of such recorded instrument shall be filed in the office of the secretary of state: Provided, that no subsequent amendment of the articles of association, which is expressly authorized by law, shall take effect until same in due form has been so recorded and certified."

The proviso was added by the amendment of 1903 as it appears therein.

Prior to the amendment of 1927, the section, which is now 5339 R. S. Missouri, 1939, provided that the articles of agreement should be recorded in the office of the recorder of deeds, but, as amended in 1927, the section provided: " * * be filed in the office of the recorder of deeds." Also, as amended in 1903, this section provided that the articles of agreement should be recorded in the office of the recorder of deeds, and since the present section, which was amended in 1927, specifically states, "filed", it shows it was the intention of the legislature to file, and not record, the articles of agreement in the office of the recorder of deeds.

In the case of Wallace v. Woods, 102 S. W. (2d) 91, pars. 9-11, the court, in referring to amendments of certain laws said:

"The primary rule of construction of statutes is to ascertain the law-makers' intent, from the words used

if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration. * * * 2 Lewis, Sutherland on Stat. Const. (2d Ed.) Sec. 363; Endlich on Interpretation of Statutes, Sec. 329; and Maxwell on Statutes (5th Ed.) 425.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920, loc. cit. 925. We must determine the question involved upon the statute we now have rather than upon the original enactment. Words used must be read in the light of the amendments made, and might take a broader meaning as the application of the statute was broadened. We can best decide the present meaning of this section by considering the various steps taken to change it from what it was at first to what it is now."

The Court of Appeals of this State, in the case of Dawson v. Cross, 88 Mo. App. 292, l. c. 299, defined "file" as follows:

"'File' meant at common law, a thread, string, wire, upon which writs and other exhibits of courts and offices were fastened or filed for the more safe keeping and ready turning the same. A paper is said to be filed when delivered to the proper officer and received by him to be kept on file. This, which

we take to be the present ordinary sense of the word 'filed,' would be presumed to be the legislative sense unless the contrary is made to appear which it does not. * * * * *

The Court of Appeals, also, in *Murphy v. Overall Co.*, 225 Mo. App. 866, l. c. 869, in defining, "file," said:

"The word 'file' has a well understood meaning, as well as legal significance, and inasmuch as it is impossible to file an oral demand, the words of the statute, its purpose and intent and the object to be accomplished by it cannot be met except by a written statement of the claim. The lexicographers derive the word 'file' from the Latin 'Filum,' a thread; and its application seems to be drawn from the ancient practice of placing papers upon a thread or file for ready reference. Webster says 'to file' means to lay away papers for presentation and reference. Bouvier says a paper is said to be filed when it is delivered to the proper officer.' (Thompson v. Southern Express Co., 61 S. E. 182, 183.)"

Under the above quotation it can be said that the word "file" means, "laying it away in the office of any office to remain there for reference." Under the facts in your request the recorder of deeds recorded the articles of agreement and then returned them to the corporation. But, under Section 5339, supra, it is

specifically provided that the articles of agreement of the corporation should be filed and no mention is made of the recording of the same. "Filing" an instrument is more for the safekeeping of the original instrument. It was so held in the case of Paving Co. v. O'Brien, 128 Mo. App. 267, 1. c. 282, where the court said:

"A paper or document is said to be filed when it is delivered to the proper officer and lodged by him in his office. At common law, a file meant a thread, string, or wire upon which writs and other exhibits of courts and officers were fastened or 'filed for the more safe keeping and right turning of same.' (Dawson v. Cross, 88 Mo. App. 292.) * * * "

The word "recorded" in ordinary usage signifies copied or transcribed into some permanent book, and word is also defined as copying an instrument into public records in book kept for that purpose by or under superintendence of officer appointed therefor. Word "record," in statute respecting reclamation district tax sale certificate, means copying instrument into proper book and indexing as provided by law (Pol. Code, Sec. 3480). (Dougery v. Betten-court (Cal.) 6 P. (2d) 499, 502.)

The word "recorded," in ordinary usage, signifies copied or transcribed in some permanent book. It is in this sense that the word "recorded" is used in Civ. Code, Sec. 1213, declaring that every conveyance of real property, acknowledged or proved and certified and recorded, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees. (Cady v. Purser, 63 P. 844, 846, 131 Cal. 552, 82 Am. St. Rep. 391.)

In discussing the distinction between "filing", and "recording", the Supreme Court of this State, in one case, held that filing could be considered recording. It was so held in the case of State v. Hurt, 183 S. W. 333, 1. c. 335, where the court said:

"Section 6323, R. S. 1909, extends the provisions of said section 2819 so as to cover any instrument 'for the recording of which provision has been made by law.'

"The chattel mortgage in question here had been recorded, not by copying it on books in the recorder's office, but by placing it on file in such office. We hold that by being thus on file it was 'recorded' in the contemplation of such sections, and that the certified copy of the mortgage to the Bank of Alton was properly admitted in evidence."

CONCLUSION

It is, therefore, the opinion of this office, that under Section 5339 R. S. Missouri, 1939, the articles of agreement of a corporation should be filed in the office of the recorder of deeds and should remain in the office of the recorder of deeds.

It is further the opinion of this department that the recorder of deeds should not record the articles of agreement of a corporation and then return them to

Honorable D. W. Breid

-9-

January 11, 1943

the president or secretary of the corporation.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri.

WJB:RW

GENERAL ASSEMBLY: General Assembly may furnish the members
STAMPS: thereof stamps for official business.
EXPENSES:

February 18, 1943

Hon. Frank P. Briggs
President Pro Tem of the Senate
Senate Chambers
Capitol Building
Jefferson City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not the State Senate may adopt a resolution providing for the furnishing of stamps to its members for official business.

From your telephone conversation in connection with this request, we understand this inquiry goes to the question of the authority of the General Assembly to furnish to its members stamps for use in official business, and whether or not such an act would violate the provisions of Section 16, Article IV of the Constitution of Missouri as amended.

Under Section 1 of Article IV of the Constitution of Missouri the General Assembly is granted all legislative power, subject to the limitations in the Constitution. We also call attention to Section 8, Article XIV of the Constitution of Missouri, which prohibits the increasing of compensation to officers during the term of office.

If this allowance for postage should be considered as compensation, then it might be held to be in violation of said Section 8, supra, as well as in violation of the limit fixed in the late amendment, which reads as follows (Laws of Missouri 1941, page 719, Section 16):

"The members of the General Assembly shall severally receive from the State Treasury for their services a monthly salary of one hundred and twenty five

dollars per month commencing as of January 1st next following the adoption of this Section, and upon certification by the President and Secretary of the Senate, and by the speaker and chief clerk of the House of Representatives, as to the respective members thereof, the State Auditor is hereby directed and empowered to audit and the State Treasurer to pay such compensation without legislative enactment. The members of either house shall also receive the sum of one dollar (\$1.00) for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route."

Said Section 16 before its repeal and re-adoption, contained the following provision with reference to stamps and extra compensation to members of the General Assembly:

"* * * Each member may receive at each regular session an additional sum of thirty dollars, which shall be in full for all stationery used in his official capacity, and all postage, and all other incidental expenses and perquisites; and no allowance or emoluments, for any purpose whatever, shall be made to or received by the members, or any member of either house, or for their use, out of the contingent fund or otherwise, except as herein expressly provided; * * * *"

We must assume that in the preparation of the new amendment the old section was under consideration and especially the portions of that section which would not be included in the new amendment. With that presumption it is quite apparent that the framers of the new amendment only intended to provide for the pay for compensation or salary and mileage to the members.

With that presumption, the expression "expressio unius est exclusio alterius" might be applied here, and, in doing so, it could be argued that since the new amendment only provides for pay for salary and mileage to the members that the framers of that amendment did not intend to fix the amount that the legislature might allow to members for payment of postage, etc., and therefore, left that item to be determined by the General Assembly under its authority as fixed by said Section 1 of Article IV, supra.

In the case of Macon County v. Williams, 224 S. W. 835, 284 Mo. 447, the court distinguished between compensation or salary and expenses, the law providing that the probate judge should receive the same compensation as the circuit judge. The question in that case was whether or not the probate judge could receive as compensation the \$1200 per annum allowed as expenses to the circuit judge. We quote at length from the opinion in this case because we think it is very much in point to the question here. At l. c. 452 (284 Mo.) the court said:

"This question, whether allowances to officers for expenses comes within the meaning of the word compensation, has arisen in several cases. In Wisconsin, under a constitutional provision somewhat analogous to ours, in so far as the question presented was concerned, it was held that a statute providing for a payment to each circuit judge of \$400 per annum 'as and for his necessary expenses while in discharge of his duties,' did not constitute additional 'compensation' in the constitutional sense. (Milwaukee County v. Halsey, 149 Wis. 1. c. 87.) In McCoy v. Handlin, 35 S. D. 1. c. 514 et seq., under a more comprehensive constitutional provision than ours, the Supreme Court of South Dakota held that an allowance of \$600 per annum to the supreme judges 'in consideration of expenses' was not in violation of the prohibition against increasing the compensation of judges. The court held that the salary provided could not be increased, but that the allowances

of expenses, as such, did not have that effect. In considering a similar question with respect to a claim that a Federal judge, who occupied a house belonging to the Government in the Canal Zone, must account for the rent thereof, CLAYTON, J. (Smith v. Jackson, 241 Fed. l. c. 770), quotes from the opinion in the case of McCoy v. Handlin, as follows:

"There it was said: 'It is clear that the Legislature did not intend, in the enactment of such legislation, to increase the salaries of the judges, or to grant them any perquisites or emoluments for the discharge of their duties, but only intended to assure them, in so far as possible, that for the performance of their official duties alone, and not for the performance of such duties and the payment of the expenses incident thereto, they should receive the salaries provided by law for the performance of such duties.' And again, the court said: 'These men (the framers of the Constitution of South Dakota) must have known that Section 1, Article 2, of the Federal Constitution declared that the President should receive for his services a compensation 'which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.' These men must have known that the word 'emolument' was, as recognized by every authority, a term broad and comprehensive, one which includes within it 'perquisites,' 'salary,' 'compensation,' 'pay,' 'wages,' and 'fees.' These men must have known that, with the above provisions of the Federal Constitution in force, the Congress of the United States, a body of men which at all times during the history of this Government has had among its members many of the greatest constitutional lawyers of the day, had enacted

legislation under which the President, for nearly a century prior to the framing of our Constitution, had been furnished a home, horses, carriages, servants, household equipment, and many other things incidental to and appropriate to his high office. These men must have known that such Federal legislation had never been questioned either as regards its propriety or its constitutionality. These men must have known that in practically every State of the Union (in many of which there were constitutional provisions similar to the one above referred to in the Federal Constitution and to the ones relied upon by defendant in this case) there had been legislative enactments making provisions for the several governors similar to those made by the Federal Congress for the President, as well as innumerable measures appropriating money to be paid other officers to recompense them for expenses incurred in the discharge of their official duties. Is it possible for any one to presume that these men, with all these facts in mind, intended, by the words used in our Constitution, to prohibit allowances for expenses incident to the discharge of public duties? Further light has since been thrown upon the construction given to the provision of the Federal Constitution above referred to by the Act of June 23, 1906 (34 Stat. at L. 454, c. 3523; Comp. State. 1913, sec. 225), which provides: 'That hereafter there may be expended for or on account of the traveling expenses of the President of the United States such sums as Congress may from time to time appropriate, not exceeding \$25,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely.' Under appropriations thereafter made by Congress, Presidents Roosevelt and Taft received, and today President Wilson is receiving, thousands of dollars each year. So far as we know, it has never been suggested that the money so allowed was an 'emolument,' and therefore unconstitutional. No one has ever seen fit to accuse these Presidents of

being grafters. The judges of the Federal courts, whose salaries are fixed by a law, declaring that such salaries shall be the 'compensation for their official services,' draw from the United States Treasury a sum not exceeding \$10 per day when absent from the places of their residence. (Act March 3, 1911, c. 231, sec. 259; 36 Stat. at L. 1161; Comp. Stat. 1913, sec. 1236.) This allowance is not given as an increase of salary but to cover the expenses incident to their being away from home in the discharge of their duties." "

From this opinion we conclude that "compensation and salary" are different and distinct from "expenses," when payment to officers are under consideration.

In our research on this question we failed to find any Missouri cases dealing with the question of compensation and expenses to members of the General Assembly, but all of the outstate authorities, in which such question has been considered, support our conclusions here. In the case of Christopherson v. Reeves, 184 N. W. 1015, the Supreme Court of South Dakota had before it a question of whether or not a lump lump sum allowed to legislators for expenses was in violation of a Constitutional provision fixing the pay of legislators. The provisions of the Constitution of that state relating to that subject, (Section 6 of Article 3) read as follows:

"The terms of the office of the members of the Legislature shall be two years; they shall receive for their services the sum of five dollars for each day's attendance during the session of the Legislature, and five cents for every mile of necessary travel in going to and returning from the place of meeting of the Legislature on the most usual route.

"Each regular session of the Legislature shall not exceed sixty days, except in cases of impeachment, and members of the

Legislature shall receive no other pay or perquisites except per diem and mileage."

At l. c. 1016, the court, in the Reeves case, supra, quoted a rule which we think could be applied here:

"One question will be found running through all the decisions wherein courts have passed upon the validity of statutes providing allowances to public officers, to wit: Was the purpose of the Legislature to increase the salary, or was its purpose merely to save such salary, so that the officer would, in fact, receive the whole thereof, for the performance of his official duties?"

The court in this opinion, also considered some Illinois cases, which were cited by the Attorney-General, and made the following statement at l. c. 1018:

"The Attorney General, in his brief, quotes at length from, and relies upon, the decisions of the Appellate Court of Illinois in the cases of Fergus v. Russell, 270 Ill. 626, 110 N. E. 887 and 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120, where an injunction was sought against the auditor of public accounts to restrain him from issuing warrants for various expenses to the members of the General Assembly. Statutes had been passed appropriating sums for mileage and for telephone services to the members of the Assembly under a Constitution which provided (section 21, art. 4, Constitution of Illinois) that--

"Members of the General Assembly are prohibited from receiving, in addition to such salary as may be fixed by law, "any other allowance or emolument, directly or indirectly, for any purpose whatever, except the sum of

\$50 per session to each member, which shall be in full for postage, stationery, newspapers and other incidental expenses and perquisites."

"Thus it will be seen that the framers of the Constitution of that state provided for expenses, mentioned them expressly in the Constitution, and used the word as distinguished from the word 'perquisite,' and the interpretation of this Constitution must, of necessity, have precluded any other allowance for mileage or for other expenses. If the word 'expenses' had occurred in our Constitution, we would not hesitate for one moment to declare the law unconstitutional. It is the absence of this word, and the absence of any provision limiting the right of the Legislature, to provide expenses, which makes it difficult for us to see the applicability of this case to the matter at bar."

It will be noted that the court in this opinion particularly referred to the omission of the word "expenses," in the portion of the South Dakota Constitution relating to pay of legislators and, for that reason, it held that the Legislature had authority to pass legislation providing for expenses of its members.

Our Supreme Court, in *Ewing v. Vernon County*, 216 Mo. 681, made a statement which is somewhat applicable here, especially with reference to compelling an officer to pay expenses of his office. In that case the janitor expense was under consideration and the court made this statement, l. c. 689:

"It is believed that the fundamental constitutional maxims to the effect that all government is instituted solely for the good of the whole people, is intended to promote the general welfare, and that private property shall not be taken or

damaged for public use without just compensation, aided by a common sense construction of statutes evidencing a liberal and wise public policy as over against a narrow, cheese-paring one, have caused a public janitor service paid out of the common purse to be so long and universally used in public buildings and all public offices of cities and counties in Missouri, that the precise point has not hitherto come up for decision. * * * * *

The cases which we have cited have considered statutory or Constitutional provisions and not resolutions. We note that you propose to handle this matter by way of resolution. This may be sufficient, however, we call your attention to Section 25 of Article IV of the Constitution, which seems to provide that legislation be enacted by the passage of bills. This might be the safer procedure to take to accomplish your purpose.

CONCLUSION

From the foregoing, it is the opinion of this Department that the General Assembly may provide stamps for official business of its members and such an act would not be in violation of Section 16 of Article IV of the Constitution, as amended Laws of Missouri 1941, page 719.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

TWB:CP

TAXATION: Property held by county court for use and benefit
EXEMPTION: of county school fund is exempt from taxation; if
it is so held on the assessment date such property
remains exempt even though title thereto passes
to a non-exempt holder before the next assessment
date.

January 30, 1943

Mr. Loyd Bryan
County Clerk
Mercer County
Princeton, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you
submit the following statement of facts and request for an
opinion:

"Will you please mail to me your
opinion on the following:

"On May 4, 1942 Mercer County School
Fund Principal foreclosed on a School
Loan which they had bid in. On July
1, 1942 they sold this property to
Myrtle O. Boatman but there was noth-
ing stated in the deed as to who would
pay the taxes.

"A few days ago Mrs. Boatman came in
asking if the Court had paid the 1942
tax and stating that she thought they
should pay them as she was not owner
of this property at the time it was
assessed.

"The County Court however, believes
Mrs. Boatman should pay the taxes. In
your opinion who is responsible for
the taxes?

"If the county School Fund is respon-
sible for the tax, are they allowed to
take them off with an abatement as tax-
exempt property?"

The county court, under the provisions of Section 10389, R. S. Mo. 1939, may purchase lands which it sells to foreclose a school fund mortgage. In such case the lands are taken to the use of the township out of the school fund of which the mortgage or loan was made or in the name of the county court where the loan is made out of general school funds.

In speaking of the capacity in which such lands are held, the court, in *Saline County et al. v. Thorp et al.*, 88 S. W. (2d) 183, 1. c. 186, said:

"* * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. *Montgomery County v. Auchley*, 103 Mo. 492, 15 S. W. 626.

"Sections 9243-9256, R. S. 1929 (Mo. St. Ann., Secs. 9243 to 9256, pp. 7098-7104), say what a county court can do with reference to the investment, collection, and reinvestment of public school funds. These statutes require that county courts 'diligently collect, preserve and securely invest * * * on unincumbered real estate security, worth at all times at least double the sum loaned * * * the county school fund'; and that these funds 'shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools.' * * *"

Section 6 of Article X of the Constitution of Missouri, provides in part as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. * * * * *

Section 10937, R. S. Mo. 1939, provides in part, as follows:

"The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; * * * * *

Under these sections the public school property mentioned in your request is exempt from taxes. However, the question which you submit is when must such property be held by a tax exempt body in order that it may be exempt.

Section 10940, R. S. Mo. 1939, provides:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

In the case of State ex rel. Hayes v. Snyder, 139 Mo. 549, the court held that the person who owns the property on assessment date is the one who is liable for taxes unless such property is exempt from taxation. In the case which you submit the tax exempt body held the property on June 1st,

1942, but sold it on July 1st, 1942, which was before the levy was made on this particular assessment. So, in this case we have the property in question being held by a tax exempt body on assessment date.

In Vol. 61 C. J., page 406, Section 417, the principle applicable here is stated in the following language:

"If property taxable on the assessment date is transferred within the year to a person, institution, or corporation in whose hands it is exempt, the exemption does not commence until the following assessment date; if exempt on that date and transferred within the year to a person in whose hands it is no longer exempt, the exemption does not terminate until the following assessment date. * * * *"

Applying this rule here, the property being held by a tax exempt body on June 1st, 1942, the date of the assessment, then this exemption will not terminate until the following assessment date.

From these authorities it would appear that the assessor was in error in placing the property on the tax books. Since the books are out of the possession of the assessor, then it would be beyond his jurisdiction to make the correction. Since no taxes have been levied on this property and the books are now in the control and custody of the county court, then we think the provisions of Section 10998, R. S. Mo. 1939, could be applied here. This section provides in part as follows:

"The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes; * * * * *"

By this provision the taxpayer could go before the county court and by making a proper showing have the error corrected.

CONCLUSION

From the foregoing it is the opinion of this department that properties which are held by a tax exempt body on tax assessment date will continue to be exempt until the following assessment date, regardless of the fact that the ownership of such property passes to a non tax exempt body or person.

We are further of the opinion that the county court may correct this error at this time.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

TWB:CP

CONSTITUTIONAL
CONVENTION:

March sixth last date for filing
certificates of nomination of dele-
gates.

February 13, 1943

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Dear Mr. Brown:

Under date of February 10, 1943, you wrote this
office requesting an opinion as follows:

"Inquiry has been made in connection with elec-
tion of delegates to the constitutional conven-
tion, which the Governor has set to be held on
April 6, 1943. The inquiry requests deadline
for filing nominations for district delegate,
and also for delegate-at-large. What is the
final limit for filing with me, by petition for
delegate-at-large? What is the final limit
for filing with me for district delegate?"

Provision is made in Section 3 of Article XV
of the Constitution of the State for calling a constitu-
tional convention and electing delegates to the conven-
tion. Portions of this section of the Constitution per-
tinent to your question are here set out:

"The general assembly may at any time authorize
by law that a vote of the electors of the state
be taken upon the question, 'Shall there be a
convention to revise and amend the Constitution?'
which shall be submitted to the electors on a
separate ballot without party designation of any
kind, at either a special or general election,
as the general assembly may provide, and if a

Hon. Dwight M. Brown

-2-

February 13, 1943.

Majority of the electors voting for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates to the convention, on a day not less than three nor more than six months after that on which said question shall have been voted on. * * * * *

In order to secure representation from different political parties in each senatorial district, each political party as then authorized by law to make nominations for the office of state senator in each senatorial district shall nominate only one candidate for delegate from such senatorial district, and such candidate shall be nominated in such manner as may be prescribed by the senatorial committee of the respective parties, and a certificate of nomination shall be filed in the office of the secretary of state at least thirty days before such election, * * * * * and all candidates for delegates-at-large shall be nominated by nominating petitions only, which shall be filed in the office of the secretary of state at least thirty days before any such election * * * * *
(Underscoring Ours)

By this section of the Constitution the certificates of nomination for all candidates, which are required to be filed in the office of the Secretary of State, are to be filed at least thirty days before the day of the election.

The rule for the computation of time is found in the fourth clause of Section 655 R. S. Mo., 1939:

Hon. Dwight H. Brown

-3-

February 13, 1943.

" * * * * * fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded; * * * * * "

An excellent illustration for the operation of this rule is found in the case of *Stutz v. Cameron*, 254 Mo. 340, at l.c. 352:

"Under this rule, we should not count October 17th, because it was the day upon which the notices were posted. We must know that October has thirty-one days. Excluding the 17th of October, we would have left fourteen live days in October, and the petition was, under the notices, to be presented on November 7th which gives seven more days or in all twenty-one days. This of course on the theory that we count Monday the first day of the term as a day. If we do not count Monday as a part of the term of notice, then we still have twenty days' notice, if under the statute we can count Sunday. * * *

This was a case in which the question arose as to whether or not certain notices which were required to be posted twenty days before the first day of a term of court were posted in time.

Applying the rule to your question and treating April sixth as the first day, excluding it from the

count we have five live days in April. This date requires twenty-five days in the month of March, which would fix the day as Sunday, March 7, 1943. The statute provides that when Sunday is the last day upon which an action may be done it shall be excluded. In the case of State ex rel. Bulger v. Souther, 278 Mo. 610, it is pointed out that this is a rule of computation at local citation 619:

" * * * * * The statute (Sec. 8057, R. S. 1909) prescribes the applicable rule for computing time as follows: 'Fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded.' December 1, 1918, fell on Sunday. Had it been any other day of the week it would have been the last day for service under the statute. Being Sunday the statute requires it to be excluded. It is at this point a difference of opinion arises. Respondent contends that when it is excluded, Saturday, November 30th, became the last day for service. Respondent thus seeks to exclude Sunday, December 1st, from the time for service. This loses sight of the language and purpose of the statute. What the statute lays down is a rule for computing the time within which an act is to be done. The words 'Sunday shall be excluded' means it shall be excluded from the computation, not from the time within which the act shall be done. Excluding Sunday, December 1, 1918, from the computation leaves Monday, December 2nd, as the last day upon which service could have been made. The construction contended for by respondent was given this statute by this court at the January term, 1870. (Patrick v. Faulke, 45 Mo. 312.)

At the March term, 1870 (Bank v. Williams, 43 Mo. l. c. 19), as is pointed out in Jordan v. Railroad, 92 Mo. App. l. c. 85, the Patrick case was 'virtually overruled.' In Keys v. Keys, 217 Mo. l. c. 65, in an opinion by Graves, J., this view of the Court of Appeals is approved and abundant other authorities cited. In Walker v. Sundermeyer, 175 S. W. l. c. 187, in an opinion by Roy, C., Keys v. Keys, was approved and followed. There are other decisions in point announcing the same rule. The statute is not fairly susceptible of any other construction. State ex rel. v. McElhinney, 199 Mo. l. c. 80, is relied upon by respondent. It is to be observed that the court was not deciding the point now in issue. The Statement there made of the rule did not affect the decision in that case. The fact that Sunday was excluded answered the argument the court was examining, and no occasion arose to discriminate between the rule now contended for by respondent and that announced in the cases already cited.

"Applying the settled rule, the last day for personal service in the contest proceeding was Monday, December 2, 1918. * * * *"

This case involved the serving of notice which was required to be served within twenty days after a certain date and the last day was Sunday. Still applying the rule and excluding Sunday, March 7, 1943, from our computation Saturday, March 6, 1943, would be fixed as the last day for filing certificates of nomination.

Hon. Dwight H. Brown

-6-

February 13, 1943.

It might be urged that in applying the rule we should reverse our count and start with Sunday, March seventh, and excluding it, Monday, March eighth, would be the last day for filing. However, if this were done certificates filed on Monday would not be filed at least thirty days before April 6, 1943, as is required by the Constitution.

CONCLUSION

It is, therefore, the conclusion of the writer that Saturday, March 6, 1943, is the last date for filing in the office of the Secretary of State certificates of nomination for district delegates to the Constitutional Convention and it is also the last date for filing certificates of nomination for delegates-at-large to the Constitution.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

(SUPPLEMENTAL OPINION)

ELECTIONS: Time for certifying Constitutional Convention nominees
by the Secretary of State.

March 11, 1943.



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This will acknowledge receipt of your letter of March 10, 1943, in which you request an opinion of this office. This request, omitting caption and signature, reads as follows:

"Art. XV, Sec. 3 of the Constitution provides that I shall certify names of nominees for delegate to the constitutional convention 'not less than fifteen days before the election.' Sec. 11540 seems to permit an objector to a nomination to secure a court order 'before the date for the certification of the names of nominees by the secretary of state to the county clerk'

"These provisions make it necessary that I know exactly on what date and at what hour I am free to certify the nominees, if no court order has been served upon me.

"May I have your opinion, please."

Section 3 of Article XV, of the Constitution of Missouri, which deals partly with your problem, is a rather long provision and we will only cite that portion which applies to the question herein:

"* * *, and such candidate shall be nominated in such manner as may be prescribed

by the senatorial committee of the respective parties, and a certificate of nomination shall be filed in the office of the Secretary of State at least thirty days before such election, * * * *

The election for delegates to the Constitutional Convention is called for April 6, 1943, and under the provision just cited above this Department has rendered an opinion which holds that the last day for the certifying of the nominees to the Secretary of State was March 6, 1943, at midnight.

We next call your attention to Section 11540, R. S. Mo. 1939, which, like the Constitutional provision cited above, is a long provision and we will again cite only that part which applies to the question which you have asked. The pertinent part of such section provides as follows:

"All certificates of nomination which are in apparent conformity with the provisions of Sections 11539 and 11540, shall be deemed to be valid unless objection thereto shall be duly made, in writing, within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination * * * * *
The secretary of state or the county clerk, as the case may be, with whom the original certificate was filed, shall in the first instance pass upon the validity of such objection and his decision shall be final, unless an order shall be made in the matter by the supreme court, or a circuit court, or by a judge of such court in vacation, before the date for the certification of the names of the nominees by the secretary of state to the county clerk * * * * *

March 11, 1943

Applying such section to the question which you have asked, we find that all objections to the certificates of nomination were limited to March 9, 1943, at midnight. After that time, under the provisions of Section 11540, supra, it would be impossible to file objections to any certificates of nomination of the delegates to the Constitutional Convention.

Therefore, it is the opinion of this Department that in all cases where there have been no objections filed to the certificates of nomination of the delegates to the Constitutional Convention, the Secretary of State was permitted, beginning March 10, 1943, to certify any such names to the various county clerks as nominees for this election. In those cases where objections have been filed and ruled on by the Secretary of State and a court order has not been made directing the Secretary of State to not certify any name of a delegate, the Secretary of State is empowered to certify such names to the various county clerks. The only names which he is not permitted to certify to the county clerks are those in which the court has made an order that such names shall not be certified.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

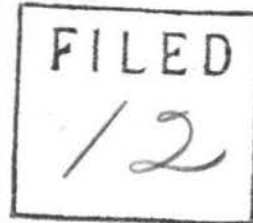
JSP:EG

LAWS: Construction of.

INITIATIVE OR REFERENDUM PETITION: How to compute the number of legal voters necessary.

August 28, 1943

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri



Honorable Sir:

We are in receipt of your letter of August 23rd, requesting an opinion, which letter is as follows:

"Inquiry has been received by this office as to how and in what manner the total number of votes cast for Justice of the Supreme Court shall be determined, upon which to base the percentage of legal voters necessary to sign an initiative or referendum petition before filing, in conformity with Section 57, Article IV, Missouri Constitution.

"This question arises in connection with the amendment of Article VI of the Constitution, adopted November 5, 1940, and relating to the method of selecting Supreme Court and other Judges.

"Will you kindly so advise this office."

Article IV, Section 57 of the Constitution of Missouri is in part as follows:

"* * * The first power reserved by the people is the initiative, and not more than eight per cent of the

legal voters in each of at least two-thirds of the congressional districts in the State shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. * * * The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative, or for the referendum, shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. * * "

Article VI, Section 4 of the Constitution, as amended, provides for the form of ballot to be used in the election of a Judge. Each voter is entitled to vote "Yes" or "No" on the question of whether or not a certain Judge of the Supreme Court be retained in office. The last paragraph of said section, as it appears in Laws of Missouri, 1941, page 724, is as follows:

"Whenever a declaration of candidacy for election to succeed himself is filed by any judge under the provisions of this section, the Secretary of State shall not less than thirty (30) days before the election certify the name of said judge and the official title of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes

counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

From the foregoing laws it appears that such voter is entitled to cast one vote for each Judge who is running for the Supreme Court. He may either vote for or against the retention of such Judge in office.

It seems that the only reasonable construction that could be placed on the word "for", as used immediately preceding the words "Justice of the Supreme Court", would be that it means "with respect to" or "with regard to". In the case of *Elmore-Schultz Grain Co. v. Stonebreaker*, 202 Mo. App. 81, 214 S. W. 216, it was held that under Revised Statutes of 1909, Section 4780, denouncing as gambling and void all purchases and sales or contracts and agreements for the purchase of grain, without the intention of receiving or delivering the property, the word "for" may be treated as equivalent to the words "with respect to". In the case of *State v. Consolidated Virginia Mine Company*, 16 Nev. 432, it was held that the word "for" in Const., Art. 4, Secs. 20 and 21, prohibiting the passage of any local or special law for the assessment and collection of taxes, means "with respect to", or "with regard to".

If only the votes for the retention of a Supreme Court Justice were counted and the votes against the retention of such Judge were ignored, such total may not represent a fair comparison with the total number of voters casting ballots at such election, and it seems that it was the intention of the lawmakers that the figure used would compare favorably with the total number of voters who cast their votes in the last preceding election.

Article IV, Section 57, in providing that the whole number of votes cast for a Justice of the Supreme Court at the regular election last preceding the filing of any petition for an initiative, obviously means the whole number of votes cast for and against one Judge of the Supreme Court. It appears that it was the intention of the lawmakers to

August 28, 1943.

ascertain the number of voters who cast ballots in the last preceding election and to require not more than eight per cent of the regular voters, in each of at least two-thirds of the congressional district, to sign such petition.

CONCLUSION

It is therefore the opinion of this department that the total number of votes cast for a Justice of the Supreme Court shall be determined by ascertaining the number of votes cast for and the number cast against a Judge of the Supreme Court at the last preceding election, and adding these two items. Such total will constitute the total number of votes cast for a Justice of the Supreme Court.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

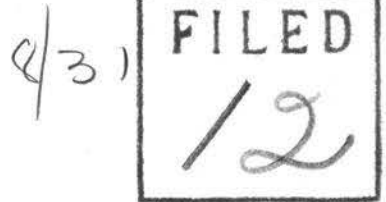
ROY MCKITTRICK
Attorney General

LAP:jn

CONFEDERATE HOME- : Board of Trustees of Confederate
CARETAKER AND : Home at Higginsville may employ
ASSISTANTS. : caretaker and assistants.

August 30, 1943

Honorable A. T. Broughton
President, Board of Trustees
Confederate Soldiers Home
Higginsville, Missouri



Dear Sir:

This is in reply to yours of recent date on the question of whether or not the Board can employ a caretaker and his assistants at the Home.

The rule on the authority of the Board to perform certain acts, is that it must look to the statute for its authority.

Sec. 15130 R. S. 1939, confers authority on the Board to employ various employees. Said section provides in part as follows:

***Said board of trustees shall ***
also provide for a superintendent
who shall be a descendant of a soldier
or a sailor who shall have served in the
army or navy of the Confederate States
of America, and for other necessary
employees.*** "

The appropriation for the Home was made in Sec. 33, of House Bill 419, of the 62nd General Assembly.

Under the heading of "Personal Service" in this bill, there has been appropriated \$15,000.00 for caretaker and his assistants.

It would be a question of fact who are assistants to the caretaker.

By Senate Bill 178, the Board of Trustees is abolished and its powers and duties are transferred to the Eleemosynary Board. This Bill goes into effect ninety (90) days after adjournment. So the Board will function until that date, even though no appropriation is made for the Board's compensation. However, the caretaker and his assistants may be paid under the appropriation.

Honorable A. T. Broughton -²~~1~~-

August 30, 1943

C O N C L U S I O N

It is therefore the opinion of this department that the Board may employ a caretaker and his assistants and pay their salaries therefor out of the appropriation made under Sec. 33 of House Bill 419, until ninety (90) days after adjournment of the 62nd General Assembly, which will be November 22, 1943.

Respectfully submitted,

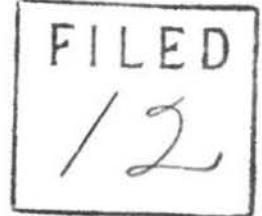
TYRE W. BURTON
Assistant Attorney General

TWB:LeC

APPROVED

ROY MCKITTRICK
Attorney General

August 31, 1943



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

In response to numerous requests concerning the effective dates of acts passed by the 62nd General Assembly we submit the following opinion on the general subject:

During the session of the 62nd General Assembly, held in Jefferson City, beginning in January, 1943, there was a Concurrent Senate Resolution presented (Resolution No. 2) which recommended and resolved that an amendment to the Constitution be made declaring that no law passed by the General Assembly should become effective until ninety days after the signing of such laws by the Governor of this State. This Resolution was presented in the form of an Amendment to the Constitution on April 6, 1943, to the electorate, and the same adopted. Said Amendment provides as follows:

"Amendment repealing Section 36, Article IV, Missouri Constitution, and enacting new section providing effective date of laws of General Assembly, except appropriation acts and emergency acts.

"JOINT AND CONCURRENT RESOLUTION submitting to the qualified voters of the state of Missouri and amendment repealing Section 36, of Article IV of the Constitution of Missouri and enacting in lieu thereof a new section relating to the same subject establishing the effective date of laws, to be known as Section 36 of Article IV.

"Be it resolved by the Senate, the House of Representatives concurring therein:

"That at a special election to be called by the Governor for that purpose, or at the general election, to be held in this

state on the first Tuesday after the first Monday of November in the year 1944, there shall be submitted to the qualified voters of this state for adoption or rejection a proposition to repeal Section 36 of Article IV of the Constitution of Missouri relating to the effective date of laws, and to enact in lieu thereof a new section relating to the same subject matter to be known as Section 36 of Article IV and to read as follows:

"Section 36. No law passed by the General Assembly, except appropriation acts, shall take effect or go into force until ninety days after enactment and approval thereof as otherwise provided by this Article, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

Section 659, R. S. Mo. 1939, is as follows:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

"(a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of

public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval.

"(b) In case the general assembly, as to a law not of the character hereinbefore specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days hereinbefore mentioned, said law shall take effect on the date thus fixed by the general assembly.

"(c) Laws not of the nature hereinbefore specified enacted by the general assembly at its regular session in 1939 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1939 and each ten-year period thereafter, shall take effect on the first day of November in the year of their enactment or authorization: Provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding court shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

At first glance it might appear that the constitutional amendment above quoted provides that the laws are to become effective after ninety days from the date of enactment and approval thereof. However, after careful examination thereof, it will be noted that said law is negative in character providing that "no law passed by the General Assembly * * * * shall take effect or go into force until * * * *."

If the lawmakers had intended said act to be affirmative in character it would have been simple to have it read "All laws passed by the General Assembly * * * * shall take effect or go into effect ninety days after enactment and approval thereof * * * *"

It is true that Section 659, supra, is somewhat a repetition of Section 36, of the Constitution as it existed prior

to the adoption of the amendment wherein quoted, but if the legislature intended that said act should be repealed, it probably would have acted on said intent and repealed said statute. In fact, House Bill 652 was perfected in the house during the 62nd General Assembly but failed to be enacted, which bill purposed to repeal said Section 659, and to enact a new Section in lieu thereof. This fact indicates that the present force and effect of said Section 659 was known to the Legislature.

It was held in the case of *Reed v. Goldneck*, 112 Mo. App. 310, 86 S. W. 1104, that it must be presumed that the Legislature knows the existing law.

It has been repeatedly held that laws are presumed to be drafted with knowledge of all existing laws on the subject. *Sikes v. St. Louis and S. F. R. Co.*, 127 Mo. App. 326, 105 S. W. 700. *State ex rel. Case v. Wilson*, 151 Mo. App. 723, 132 S. W. 625.

In construing a statute, all statutes applicable to the same subject involved must be read and construed together and, if possible, harmonized. *State v. Naylor*, 328 Mo. 335, 40 S. W. (2d) 1079.

When statutes appear to be in conflict they must be harmonized if possible, according to legislative intent. *Cotes & Hopkins Realty Co. v. Kansas City Terminal Ry. Co.*, 328 Mo. 1118, 43 S. W. (2d) 817.

In construing statutes in pari materia, endeavor should be made, by tracing history of legislation on the subject, to ascertain uniform and consistent purpose of legislature, or to discover how policy of legislature with reference to subject matter has been changed or modified from time to time. *State ex rel. and to Use of Geo. B. Peck Co. v. Brown*, 105 S. W. (2d) 909, 340 Mo. 1189.

In construing statutes in pari materia, not only acts passed at same session of legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed, may be considered. *State ex rel. and to Use of Geo. B. Peck Co. v. Brown*, 105 S. W. (2d) 909, 340 Mo. 1189.

It is not difficult to harmonize Section 36 of the Constitution as amended and Section 659, R. S. Mo. 1939. Said Section 36 of the Constitution, as amended, would allow all bills to take effect or go into force ninety days from the date of enactment and approval, if there were no statutory provision setting the effective time at a later date, namely: ninety days

after the adjournment of the session at which enacted.

The 62nd General Assembly adjourned on August 23, 1943, and ninety days from said date would be November 21, 1943. However, November 21, being Sunday, the ninety-day period would not expire until November 22nd under the provisions of Section 655, R. S. Mo. 1933, which is as follows:

"* * * fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded; * * * * *

Section 38, Article IV of the Missouri Constitution is as follows:

"When the bill has been signed, as provided for in the preceding section, it shall be the duty of the Secretary of the Senate, if the bill originated in the Senate, and of the Chief Clerk of the House of Representatives, if the bill originated in the House, to present the same in person, on the same day on which it was signed as aforesaid, to the Governor, and enter the fact upon the journal. Every bill presented to the Governor, and returned within ten days to the house in which the same originated, with the approval of the Governor, shall become a law, unless it be in violation of some provision of this Constitution."

Section 12, Article V of the Missouri Constitution is as follows:

"The Governor shall consider all bills and joint resolutions, which, having been passed by both houses of the General Assembly, shall be presented to him. He shall, within ten days after the same shall have been presented to him, return to the house in which they respectively originated, all such bills and joint resolutions, with his approval

August 31, 1943

indorsed thereon, or accompanied by his objections: Provided, That if the General Assembly shall finally adjourn within ten days after such presentation, the Governor may, within thirty days thereafter, return such bills and resolutions to the office of the Secretary of State, with his approval or reasons for disapproval."

It will be noted that Section 36, Article IV of the Missouri Constitution, as amended, specifically provides an act may take effect less than ninety days after its passage and approval if it carries an emergency clause, and Section 659, R. S. Mo. 1939 also provides exceptions to the general provision that acts shall take effect ninety days after adjournment of the session. If an act is not signed by the Governor until after the session has adjourned, under the provisions of Section 12, Article V of the Constitution, the act would become effective ninety days after approval thereof. In such a case, Section 36 of the Constitution, as amended, operates to extend the effective date to a period beyond the date fixed by Section 659, supra.

CONCLUSION

Any bill which contains a clause that falls within the exceptions in Section 36, Article IV of the Constitution, as amended, and the exceptions set out in Section 659, R. S. Mo. 1939, will become effective immediately upon the enactment and approval of such act.

Any act enacted and approved prior to the adjournment of the Legislature which contains no emergency coming within the exceptions of said Section 36, Article IV of the Constitution, as amended, will be controlled by said Section 659, R. S. Missouri 1939, and will become effective ninety days after the adjournment of the session at which it is enacted and approved; except an act approved by the Governor after the adjournment of the session of the legislature will not become effective, under the provisions of Section 36, Article IV of the Constitution of Missouri, as amended, until ninety days after approval thereof by the Governor.

Respectfully submitted

APPROVED:

LEO A. POLITTE
Assistant Attorney General

ROY McKITTRICK
Attorney General

LAP:DA

SHERIFFS: Has authority to purchase supplies for county jail without County Court order, if budget is sufficient.
2) County Court cannot arbitrarily refuse account because price exceeds a prior contract price for other county buildings.

October 26, 1943

Mr. Loyd Bryan
County Clerk
Princeton, Missouri

Dear Sir:

We are in receipt of your letter of October 1, 1943, wherein you request an opinion from this department, which opinion request is as follows:

"The County Court of Mercer County, Missouri would like to have your opinion in regard to their power of auditing and adjusting accounts.

"This is in regard to a bill for fuel which was ordered by the Sheriff for use in the Jail. At the time said fuel was ordered, there were no inmates in the jail and the season was such that had there been, no fuel would have been necessary.

"Before the coal was purchased, the Court had informed the Sheriff that they had a contract price on coal and when he ordered to purchase at that price. However the Sheriff failed to do this and when the bill was presented to the Court they agreed to adjust the bill so that it would conform to their price.

"Has the County Court such authority to make an adjustment of this kind?"

It is further advised that our department wrote you on October 16, asking additional information and you replied:

"The County Court did not have an agreement as to price with the person who sold the coal to the Sheriff; The dealer does not



agree to accept the price per ton as set by the County Court."

We here quote the pertinent sections of the Revised Statutes of Missouri, 1939, which are as follows:

"Sec. 9193. There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

"Sec. 9195. The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible;
* * * *"

In the case of Missouri-Kansas Chemical Corp. v. New Madrid County, et al., 139 S. W. (2d) 457, the court, in interpreting the two sections, supra, had this to say:

"County jails are to be kept in good and sufficient condition, Sec. 8524, R. S. 1929, Mo. St. Ann. sec. 8524, p. 6243 (now Sec. 9193, R. S. 1939), and the sheriff of the county has the custody, rule, keeping and charge of the jail, Sec. 8526, Ibid (now Sec. 9195, R. S. 1939). * * *

"But, in 1933 the General Assembly enacted the 'county budget law,' Laws 1933, p. 340 et seq.; Mo. St. Ann. sec. 12126a et seq., p. 6434, which provides for an annual budget presenting a complete financial plan for the ensuing year. We refer to some, not necessarily all, of its provisions influencing our conclusions. Section 1 makes Secs. 1 to 8 inclusive, thereof applicable to counties having 50,000 inhabitants or less and requires the preparation of an annual budget of estimated receipts and expenditures by the respective county courts. * * * * * Section 8

October 26, 1943

(now Sec. 10917, R. S. 1939) requires the county court to go over, revise and amend the estimates to promote efficiency and economy, the public interest and to balance the budget; requires the recording and filing of certified copies of the revised estimate, and also provides; 'Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect;' and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond.

"New Madrid county (and Mercer county) has less than 50,000 inhabitants. It is admitted of record that the budget of New Madrid county for 1934, 1935 and 1936 for the purchase of disinfectant, etc. for the county jail, with the exception of the \$200 paid on account, had been exhausted at the time the several respective purchases here involved were made * * * * *. Now, absent exceptional circumstances, a sheriff's authority to obligate his county is restricted to his budget allowances. The directed verdict for the county was proper. Consult Traub v. Buchanan County, 341 Mo. 727, 731 (3), 108 S. W. (2d) 340, 342 (3); Carter-Waters Corp. v. Buchanan County, Mo. Sup., 129 S. W. 2d 914 (2)."

From a reading of the aforesaid case together with citations therein, we must conclude that the sheriff of Mercer County had the authority to purchase the coal in question and in doing so he obligated Mercer County for the value thereof, subject, however, to the condition precedent that the budget for the purchase of such supply for the year in which it was purchased, and at the time it was purchased, had sufficient moneys to pay for the same, as it was pointed out in the above case, the county treasurer is not authorized to pay out a greater sum of money than would be on hand as shown by the budget, and if he did so he would be liable on his official bond. (See the portion of Section 10,972, Revised Statutes, 10, quoted in the Kansas Chemical Corporation Case, Supra.) Provided further, however, it is our view that if the price of the coal could be

Mr. Loyd Bryan

-4-

October 26, 1943

said to be grossly excessive and a court refused to allow the bill then under a proper suit it would be a question for a jury to determine what price was reasonable.

Absent an expressed agreement on the part of the dealer who sold the coal to accept a sum less than the price agreed upon between such dealer and the sheriff, it is our view that under the authority in Missouri that the County Court cannot arbitrarily fix the price that a sheriff shall pay for his supplies.

CONCLUSION

- 1) It is the opinion of this department that a sheriff of a county of less than 50,000 inhabitants has authority to obligate his county for the purchase of supplies for the county jail, without an expressed order from the County Court so authorizing, providing he has sufficient funds in his budget for the year in which such supplies are bought.
- 2) A County Court has no authority to refuse accounts for supplies purchased by the sheriff for the county jail on the grounds that the County Court has a lower contract price for like supplies for other county buildings.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

BRC:ir

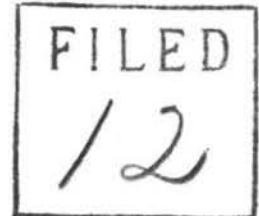
SECRETARY OF STATE:

Cities of 200,000 to 400,000
must register with Secretary
of State.

PRIVATE DETECTIVE AGENCIES:

November 19, 1943

11/24



Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Senator Brown:

We acknowledge receipt of your letter of November 3rd, 1943, in which you enclose a proposed application for registration of private detective agencies.

We have referred to Sections 7848 and 7849, Revised Statutes of Missouri, 1939, relative to the registration of those engaged in the operation or management of a private detective agency or bureau in any city of this State having a population of 200,000 and less than 400,000.

The application which you submitted to this department is, in our opinion, in due and proper form and is, therefore, approved.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

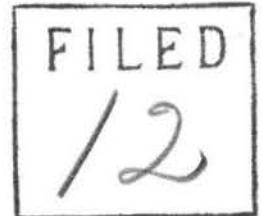
ROY MCKITTRICK
Attorney-General

CRH:CP

TOWNSHIP COLLECTORS: Township collectors liable on official bonds for failure to comply with Sections 14,009, 14,010 and 14,011; R. S. Mo. 1939.

November 26, 1943

Mr. Loyd Bryan
Clerk of the County Court
Princeton, Missouri



Dear Mr. Bryan:

This is to acknowledge your opinion request of November 16, 1943, reading as follows:

"The County Court of Mercer County Missouri, would appreciate an opinion from you in regard to settlement with Township Collectors.

"If the Collectors fail to comply with Sec. 14009-14010-14011 R.S. of 1939, may the Court refuse to make a settlement with them?

"Is it compulsory for the Collectors to comply with the above sections? If so, who is responsible for seeing that this is done?"

For the purpose of this opinion we shall consider your second question first; your third question second, and your first question last.

The first question is: Is it compulsory for collectors to comply with Sections 14009, 14010 and 14011? These sections read as follows:

"Sec. 14009. Manner of collecting taxes.
-- Every ex officio township collector, upon receiving the tax book and warrant from the county clerk, shall proceed in the following manner to collect the same; and he shall call at least once upon the person taxed at his or her place of residence, if in the township for which such

collector has been chosen, and shall demand payment of the taxes charged to him or her, on his or her property; for which, when paid, such receipt shall be given as is provided by law.

"Sec. 14010. Levy and sale of goods and chattels in case of refusal to pay tax.--In case any person shall refuse or neglect to pay the tax imposed, the collector shall levy the same by distraint and sale of the goods and chattels of the person who ought to pay the same.

"Sec. 14011. Proceedings incident to sale.-- The collector shall give public notice of the time and place of sale, and of the property to be sold, at least fifteen days previous to the sale, by advertisement to be posted up in at least three public places in the township where such sale is to be made. The sale shall be by public action."

We first call your attention to Section 13956, R. S. Mo. 1939:

"Every person elected or appointed to the office of township trustee and ex officio treasurer, before he enters on the duties of his office, and within ten days after his election or appointment, shall execute and deliver to the township clerk a bond* * *

"The conditions of such bond shall be that he, the said collector, will faithfully and punctually collect and pay over all state, county, township and other revenue, including school taxes, that may become due and collectible during the period for which such collector shall be elected or appointed; and that he will in all things faithfully perform all the duties of the office of township collector according to law* * *" (Underscoring ours.)

From the above quotation you will particularly notice the phrases "faithfully and punctually collect" and "faithfully perform* * * according to law." We shall consider these

phrases and words in light of adjudicated cases and standard definitions of the same.

In this connection your attention is directed to the case of Perry v. Thompson, 16 N. J. (Law) 72, 73, wherein the court, in speaking of the word "faithfully", said:

"The word 'faithfully', as it respects temporal affairs, means diligent, without unnecessary delay: as a faithful officer, a faithful servant, in applying to their duties."

In the case of Archer v. Noble, 3 Me. 418, 420, the court had before it for consideration the construction of a bond that had been given by a constable in office wherein the bond was conditioned by the faithful performance of the duties of that office, and in construing the bond the court said:

"Now, as Noble, constable, and his sureties, were bound for his faithful performance of the duties of his office, the condition of the bond must be construed to embrace all those instances of malfeasance, misfeasance, and nonfeasance, in the execution of his office, which would subject a principal to responsibility for similar wrongful actions of his deputy; and we have seen how far this responsibility extends."

A diligent search has not disclosed wherein a judicial interpretation has been placed upon the word "punctually," and we have relied upon the definition ascribed to the word by Webster's New International Dictionary. It is defined as follows:

"* * * promptly * * * * *"

The word "punctual", an adjective, is defined by the afore mentioned dictionary as follows:

"Punctilious in regard to appointed time; of action; manifesting attentiveness to exact time determined by

an engagement or schedule."

In the case of Shanahan v. State, reported in 142 Md. 616, 630, 631, 635, the court considered the liability of one William J. Shanahan, on his bond executed in the favor of the State of Maryland. The conditions of the bond were substantially the same as the conditions imposed by Section 13956, supra. The court in speaking of the duties imposed upon the collectors of public moneys said:

"There are many cases, both in this state and elsewhere, which prescribe with more or less clearness the duties of such an official as a county treasurer, but nowhere is it more clearly defined than in the case of United States v. Thomas, 15 Wall, 337, which opinion was written by Justice Bradley, and in it he lays down the rule that 'a collector of public moneys is a bailee and only bound to due diligence and only liable for negligence or dishonesty. * * * The measure of his accountability is to be found in the official bond.' This decision is in accord with Colerain v. Bell, 9 Metc. (Mass.) 499. In Olean v. King, 116 N. Y. 355, the collector and his bond were held liable because of the fact that he rendered no account whatever of uncollected taxes, and the case of Supervisors v. Otis, 62 N. Y. 88, follows the same rule as did Justice Bradley in United States v. Thomas, supra.

"* * * a collector may be liable for taxes which he never collects, where the failure to collect was due to some omission or act of negligence upon his part."

The evidence in the above case tended to show that the defendant was derelict in his duty for failing to make a return of defunct corporations, chattels no longer in existence, property in custodia legis; and, further, that in the case of property in custodia legis, the collector made no application to the court under the jurisdiction of which the property was for an order for leave to sell, which would have given him a

priority for taxes.

The court, in speaking further of the duties imposed upon the collector, at page 635, said:

"It is perfectly manifest that, after Mr. Shanahan ceased to be the county treasurer, he had no means at his command by which to enforce the payment of taxes due for the years when he had been county treasurer which he had not collected, but this cannot be carried to the point of saying that he and his bond were relieved of all liability for the non-collection of taxes when that was the result of some dereliction upon his part."

From the above considerations you will have noticed: That when a collector of public moneys is charged with the duty of faithfully and punctually effecting the collection of moneys due the sovereign, and fails, it amounts to non-feasance of office, and such dereliction while in office may make the collector and his sureties liable upon his therefore executed bond.

In the case of *ex parte Brown*, 297 S. W., 445, 447, the court in discussing whether a statute was mandatory or directory said:

"When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory."

In the case of *State ex rel. Stephens v. Wurdeman*, 295 Mo. 566, the court said:

"Usually the word 'shall' indicates a mandate and unless there are other things in the statute it indicates a mandatory statute."

The general proposition of law relating to the condition of an official bond is found in 46 C. J., 1068, paragraph 398. It reads as follows:

"The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

In the case of *People v. Smith*, 55 Pac. 765, l. c. 766, the court said:

"* * * the duty of the assessor to collect the tax is merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In *People v. Gardner*, 55 Cal. 305, 307, it was said: 'It is the duty of an officer to do what the law requires to be done in his office, for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by anyone in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a nonperformance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable * * * * *'."

It is, therefore, the opinion of this office that it is compulsory for the township collector to comply with Sections 14009, 10 and 11, R. S. Mo. 1939.

Your second question is: If the collector fails to comply with the sections, who is responsible for seeing that it is done?

Section 14000, R. S. Mo. 1939, is as follows:

"The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school

and township taxes and produce receipts from the proper officers for all school and township taxes collected by him, less his commission on same, at which time he shall pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, and shall make oath before said court that he has exhausted all the remedies required by law for the collection of said taxes. He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and it shall be the duty of said court to cause the clerk thereof to notify the state auditor and the prosecuting attorney of said county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the state auditor and the prosecuting attorney shall proceed against such collector in the manner provided in section 14014 of these statutes, and such collector shall be liable to the penalties in said section imposed." (Underlining ours.)

From the foregoing it is the opinion of this office that in the event the collector does not comply with Sections 14009,

14010 and 14011, the county court shall cause the county clerk to notify the state auditor and prosecuting attorney, whose duty shall be to proceed against such collector.

Your last question is: If the collector fails to comply with sections 14009, 14010 and 14011 may the county court refuse to make his settlement?

Section 14014, R. S. Mo. 1939, sets out the manner in which the township collector shall make his settlement before the county court. Section 14016 sets out the manner in which the collector shall account for uncollectible taxes. That section is as follows:

"If the township collector shall be unable to collect any taxes charged in the tax list, by reason of the removal or insolvency of the person to whom such tax may be charged, or on account of any error in the tax list, he shall deliver to the county treasurer his tax books, and shall make out and file with said treasurer, at the time of his settlement, a statement in writing, setting forth the name of the person charged with such tax, the value of the property, and the amount of tax so charged and the cause of the delinquency, and shall make oath before the county clerk, or some justice of the peace, that the facts stated in such statement are true and correct, and that the sums mentioned therein remain unpaid, and that he used due diligence to collect the same, which oath or affidavit shall be signed by the township collector; and upon filing said statement, the county treasurer shall allow the township collector credit for the amount of taxes therein stated, and shall apportion and credit the same on the several funds for which such tax was charged; and when he makes settlement with the county court, such statement shall be a sufficient voucher to entitle him to credit for the amount therein stated; but in no case shall any township collector or county treasurer, be entitled to abatement on the resident tax list until the statement and affidavit aforesaid are filed as required by this chapter.

Mr. Loyd Bryan

-9-

November 26, 1943

There is no provision in the aforesaid sections which gives the court the right to refuse the settlement as made by the collector.

In view of the foregoing, it is the opinion of this office that the county court cannot refuse to make settlement with the township collector if he complies with Sections 14014 and 14016, supra, and that the court's remedy would be to follow the procedure outlined in answer to Question 2, supra.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

GW:NH

SECRETARY OF STATE:
CIRCUIT CLERK'S
BOND:

Secretary of State has no authority to
return bond filed in accordance with
statute.

December 27, 1943

FILED

12/28

12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

Under date of December 16, 1943, you wrote this office requesting an opinion upon the question of your authority as Secretary of State to comply with a request of Mr. Hollis Stockdale, Clerk of the County Court of Barton County, which request of Mr. Stockdale is as follows:

"The Statutes of Missouri require that the Bond of the Circuit Clerk be first recorded in his county, and then deposited with the Secretary of State.

"One Lee VanPelt was clerk of the circuit court of this county from January 1, 1931, until December 31, 1938, inclusive.

"On January 1, 1935, the United States Fidelity and Guaranty Company executed its certain bond, No. 38072-07-18-35 the sum of \$5000, on behalf of Lee VanPelt, circuit clerk of Barton County, Missouri.

"On August 4, 1943, the State Auditor filed his audit with the county clerk of this county. This audit showed discrepancies in the accounts of the said Lee VanPelt. After due study of this report by the county court, the county clerk, the prosecuting attorney, the present circuit clerk, and an attorney for the

December 27, 1943

surety it was determined that a good part of said discrepancies were carried into said audit from a previous audit given in the Fall of 1937; that a great amount of these discrepancies were carried over from said Lee VanPelt's first term, which ended December 31, 1936, and were outlawed before the time the 1942 audit was presented to this county court on August 4, 1943; that a previous county court had failed to direct the surety's attention to any discrepancies.

"Therefore, in a regular session of the Barton County Court on December 6, 1943, the said county court adopted a resolution and made it part of the minutes of said session to accept the sum of \$250, and signed a release and also an assignment of Barton County's interest in and to such claims against Lee VanPelt.

"We have everything but the Bond mentioned heretofore, in this letter. We must have that Bond to return to the surety along with other documents in order that we might receive the \$250.

"Will you please give this your immediate attention."

Section 13285, R. S. Missouri, 1939, provides for the giving of a bond by circuit clerks. This section is as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such

December 27, 1943

court, in vacation. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undamaged, all books, records, papers, seals, apparatus and furniture belonging to his office."

Section 13287, R. S. Missouri, 1939, provides for the filing of the bond of a circuit clerk with the Secretary of State. This section is as follows:

"The certificate of the election of any clerk, signed by the presiding judge of the county court, and the bond of every clerk, shall be deposited in the office of the secretary of state, with the approval of the court or judges indorsed thereon."

Section 13290, R. S. Missouri, 1939, is also pertinent:

"All bonds of clerks and recorders of deeds shall be recorded in the recorder's office in their respective counties, and then deposited in the office of the secretary of state."

By the provisions of Sections 3229 and 5906, R. S. Missouri, 1939, it is permissible to use a surety company bond where bonds are required to be given.

In connection with these statutes it is desired to call to your attention brief statements of fundamental law taken from Volume 46 of Corpus Juris, pp. 1031-2, par. 287:

"The powers and authority of public officers are fixed and determined by the law. * * * *

"In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. * * *"

As the bond of a circuit clerk is required to be filed with the Secretary of State, the Secretary of State has the power to do all things necessary to preserve and safely keep the bond which is filed. There is no authority conferred upon the Secretary of State by any of the above mentioned sections of the statutes, which are the only ones relating to the filing of circuit clerks' bonds with the Secretary of State, to return to the surety a bond which has been properly filed with him. By reason of this fact, it would seem that the Secretary of State would not have power to return to the surety the bond requested in the letter of Mr. Stockdale.

In addition to what has just been said, the bond given by the circuit clerk is for the faithful performance of the duties of his office, for the proper accounting of all funds coming into his hands, and the turning over of the books, papers and property of his office to his successor. Under a bond of this nature there would exist a possibility that some other claim against the bond might arise as the statutory period of limitation has not yet expired. The settlement of one small claim for one failure to properly administer the office would not discharge the liability on the bond.

CONCLUSION

It is the conclusion of the writer that you, as Secretary of State, have no authority to comply with the request

Honorable Dwight H. Brown

-5-

December 27, 1943

of Mr. Stockdale to return the bond of Lee VanPelt as Clerk
of the Circuit Court of Barton County.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

EXTRADITION: Information on felony filed directly in the criminal court is not a sufficient affidavit before a magistrate for extradition purposes.

March 9, 1943



Mr. Donald W. Bunker,
Director
Probation and Parole
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 5, 1943, which reads as follows:

"This department would like to have an opinion from your office regarding the following proposition:

"Apparently some of the prosecuting attorney's in the State insist that it is not necessary for them to secure any affidavit from anyone before he files a case directly in the circuit court, and that this satisfies all the requirements for extradition. Other prosecuting attorneys seem to have the idea that extradition can be obtained where cases are filed directly by the prosecuting attorney in the circuit court without first having a sworn statement from the complaining witness. In other words, we are wondering what the requirements are concerning the right of the prosecuting attorney to institute criminal actions upon his own information and without the affidavit of the complaining witness, so far as it involves the right of extradition in Missouri."

Your main inquiry is whether or not a prosecuting attorney may institute criminal actions upon his own information, and without the affidavit of the complaining witness, where the right of extradition is involved.

Title 18, U. S. C. A., Section 662, page 284, reads as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

Mr. Donald W. Bunker

(3)

March 9, 1943

This section appears in the Revised Statutes of Missouri, 1939, Volume 2, at page 3988, where some of the United States Laws are set out in our statutes. It applies to felonies and misdemeanors for the reason it states "or other crimes." We are assuming that your inquiry only has reference to felonies and not misdemeanors.

Section 3893 R. S. Missouri, 1939, reads as follows:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. And if upon such hearing the justice shall determine that the alleged offense is bailable, such person or persons shall thereupon be admitted to bail conditioned for their appearance on the first day of the next regular term and from day to day and term to term thereafter, of the circuit court or the court having criminal jurisdiction in such county, to answer such charges as may be preferred against them, abide sentence and judgment therein, and not to depart said court without leave: Provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

Under this section no information shall be filed without first granting the defendant a preliminary hearing. It was so held in *State v. McKinley*, 111 S. W. (2d) 115. The defendant may waive preliminary and in that case a preliminary is unnecessary. (*State v. Nichols*, 49 S. W. (2d) 14.)

It is necessary in order that a preliminary may be had that a complaint must be filed before a justice of the peace, by someone who is competent to act as a witness, and it need not be the complaining witness.

Section 3857 R. S. Missouri, 1939, reads as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

Under this section the affidavit must be made before a justice of the peace. Such an affidavit would be sufficient to come within Title 18, Section 662, U. S. C. A., supra.

Extradition as between several states is governed by the Federal Constitution, Federal statutes and Federal decisions. (*Keeton v. Gaister*, 55 S. W. (2d) 302.)

The validity of a warrant of rendition issued by the governor of the surrendering state, in interstate extradition proceedings, must be determined by Title 18, U. S. C. A., Section 662, supra, which requires the

governor of the surrendering state to arrest the fugitive, upon demand of the executive authority of the demanding state, upon the production of a copy of the indictment found, or an affidavit made before a magistrate. (Ex parte Hagan, 245 S. W. 336).

Under Title 18, U. S. C. A., Section 662, supra, where there is no indictment, there must be an affidavit before a magistrate and it has been held that before a magistrate means an affidavit made in the presence of the magistrate and not that he must actually administer the oath. (Ex parte Davis, 62 S. W. (2d) 1086).

The United States affidavit statute in extradition proceedings, requires an affidavit stating facts of affiants own knowledge, which would be admissible as evidence and sufficient to warrant finding of probable cause. (Rafferty ex rel. Huie Fong v. Bligh, 55 F. (2d) 189).

The affidavit certified as basis for extradition proceedings must contain facts from which the governor of the asylum state may determine that there is probable cause that accused committed the crime charged, and should state facts sufficient to satisfy a magistrate that probable cause exists. (United States ex rel. McCline v. Meyering, 75 F. (2d) 716).

CONCLUSION

It is, therefore, the opinion of this department, that the information filed by a prosecuting attorney, direct in the circuit court, on a felony, in which case there has been no preliminary hearing, is not sufficient for the purpose of extradition, for the reason that such information is invalid.

It is further the opinion of this department, that it is unnecessary for the complaining witness to make the affidavit for the complaint in the justice court on a

Mr. Donald W. Bunker

(6)

March 9, 1943

felony, for the reason that the complaint may be filed by a person who has positive knowledge of the facts in the case, and who would be a competent witness.

It is also the opinion of this department, that the proper procedure to follow in an extradition matter is by way of the justice court on a proper complaint being filed before a justice of the peace which would be sufficient as "an affidavit before a magistrate", as set out in Title 18, U. S. C. A., Section 662.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

OFFICERS: A county officer may serve as a city councilman if the two offices are not incompatible.
ELECTIONS: If the candidate receiving the majority vote cannot qualify, there is no election and one receiving minority vote is not elected.

March 31, 1943



Mr. Alpha L. Burns
Lawyer
Marceline, Missouri

Dear Mr. Burns:

We are in receipt of your letter of March 25, 1943, requesting an opinion, which letter is as follows:

"I have two propositions for your opinion. First --- May one who is a county officer serve as city councilman in a city of the third class. See Section 18 --- Article NINE constitution of Missouri.

"Also when one is running and whose name is printed on a ballot in a city of the third class and whose name is on the ballot by petition and when this man is not qualified to serve and is not eligible to qualify under the law, and at the same election another name is written in for councilman and the name written is the only man eligible, and he has more votes than any one who is eligible, may be serve and qualify.

"I would appreciate this opinion at once as I may have a concrete case on each proposition."

We are unable to give you a definite opinion as to the first question contained in your letter, because

March 29, 1943

you do not designate what office the county officer is holding, who also is serving or attempting to serve as city councilman. However, I enclose herewith copy of an opinion rendered December 26, 1942, and addressed to Hon. William Barton of Jonesburg, Missouri, and written by Hon. W. J. Burke, Assistant Attorney General, and another dated December 21, 1942, addressed to Hon. Emory C. Medlin, Cassville, Missouri, and written by Hon. W. J. Burke, Assistant Attorney General. The court decisions cited in these two opinions have been again affirmed in the case of Bradley v. Page (Springfield Court of Appeals, 1942) 46 S.W. (2d) 208, 1.c. 211, in which case the court held that one elected to the office of municipal judge did not abandon his claim to that office by accepting appointment in the department of streets.

The general statement of law answering the proposition contained in the second paragraph of your letter is found in 20 C.J., p. 207, par. 267, as follows:

"It is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election. The fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected; in such case the electors have failed to make a choice and the election is a nullity. * * * "

The reasons for this rule of law is clearly presented in the language of the Supreme Court in the case of Sheridan v. City of St. Louis, 183 Mo. 25, 1. c. 34-35:

"Notwithstanding some differences of opinion, arising partly from following English decisions which are

neither satisfactory in themselves nor adapted to our circumstances, the great weight of American authority supports the rule that where an ineligible person receives the highest number of votes, the votes cast for such person so far avail as to prevent the election of the qualified candidate who has received the next highest number of votes, unless there is some statutory provision declaring the votes cast for the ineligible person void. (See authorities collected in Cooley's Const. Lim., 781, and note; Dill. on Mun. Corp., sec. 135; In re Corliss, 16 Am. L. Reg. (N.S.) 15, and note.) Here, the case is of votes cast for a man known by the voters, when they voted, to be dead; and the facts appear at first sight, to present the typical instance put in the English cases of "voting for a dead man or the man in the moon." (Queen v. Mayor, 3 L.R.Q.B. 638; Regina v. Coaks, 3E. & Bl. 254; Rex v. Hawkins, 2 Dow 148.) It cannot here be urged that the person, though disqualified "is a person still." Yet, unless we depart from the principle upon which the only sound rule rests, we must hold that the ballots upon which was the name of Mr. Miltenberger are properly counted, not for himself, for he was not in existence, but against his opponent, so far as to render a new election necessary. The relator had no plurality of votes. The will of the electors was declared against him. He is not "the person having the highest number of votes," to whom the certificate must, under the statute, be given; for these words simply imply that the successful candidate shall be the choice of the majority of voters who vote. Thus the case contemplated by the statute is not met. Through the death of one of the candidates immediately before the polls are open, an exigency arises not contemplated by the law, and the obvious consequence is a new election. It

is not the accidental death of his opponent, but the votes of the electors, which should give the certificate to a candidate.'"

* * * * *

"It thus clearly appears that the American rule and the rule in Missouri is that where the majority of the electors vote for an ineligible candidate, they do not thereby throw away their votes, and the eligible candidate who receives the next highest number of votes, being less than a majority, is not entitled to the office. * * *"

The Sheridan case and others were affirmed by the Supreme Court in the case of State on inf. McKittrick, Attorney General, v. Cameron (Supreme Court en banc, 1938) 117 S.W. (2d) 1078, 1.c. 1082, wherein the court said:

"* * * Of course, every voter is presumed to know the law, but he is not presumed to know a candidate's qualifications for office, such as age, residence, want of naturalization, political or religious beliefs. State ex rel. Atty. Gen. v. Vail, 53 Mo. 97; Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Case. 480, and cases cited therein. These cases further hold that if the candidate receiving the highest number of votes is not eligible to hold the office, the next high candidate is not, by virtue of this disqualification, entitled to the certificate of election. * * *"

CONCLUSION

It is, therefore, our opinion: (1) That a county officers can hold the office of city councilman in a city of the third class, if there is no conflict between the officers and if they are not incompatible; (2) that if a candidate receiving the majority vote is disqualified, or

Mr. Alpha L. Burns

- 5 -

March 29, 1943

unable to qualify, the election is a nullity, and the candidate receiving the next highest vote may not qualify and serve as such officer.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

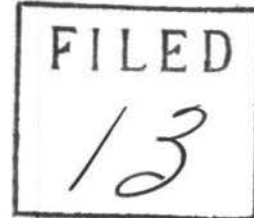
APPROVED:

ROY McKITTRICK
Attorney General

DELINQUENT JUVENILES:

Discretionary with court as to who
executes commitment.

March 31, 1943



Honorable L. M. Bywaters
Asst. Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Bywaters:

This will acknowledge recent of your letter of
March 26, in which you request an opinion as follows:

"I respectfully request an opinion from
your office based on the following facts:

Clay County, Missouri has a population
of more than 20,000 and less than 50,000
and has a Superintendent of Public Wel-
fare who derives his office through
appointment of the Circuit Court of said
county.

I should like to know who is the proper
officer under the law that is required
to convey any delinquent minors to state
institutions, such as the Missouri Train-
ing School For Boys, and who should re-
ceive fees therefor in pursuance to de-
crees issued by the Juvenile Court.

The question has arisen in this office as
to whether said duties should be carried
out by the sheriff's office or by the
office of the Superintendent of Public
Welfare.

I am of the opinion that either officer
would have the authority to commit such
prisoner depending upon the decree of the
Juvenile Court. However, in this county
there seems to be quite a heated dispute

March 31, 1943

between these two offices as to who should receive the fees therefor. Consequently, I would greatly appreciate your opinion on this matter.

Thanking you for your co-operation in this connection and for all and any past favors."

The Juvenile Court Act creates a special code of procedure for taking care of neglected and delinquent minors. The procedure authorized is civil in nature, State ex rel. Matacia v. Buckner, et al., 254 S. W. 179, 300 Mo. 359; State ex rel. Shartel v. Trimble, 63 S. W. (2d) 37, 333 Mo. 888. The costs of the proceeding may be charged to the petitioner or any person summoned, and costs not so charged and collected are to be paid by the county, Section 9676 R. S. Mo. 1939.

When jurisdiction of the child is once acquired by the juvenile court the court retains its jurisdiction until the child attains its majority, R. S. Mo. 1939, and the court has great latitude in the action it may take for the welfare and reformation of the child, Section 9688 R. S. Mo.:

"In the case of a delinquent child, the court may suspend the sentence or execution thereof from time to time, and may in the meantime commit the child to the care and control of a probation officer duly appointed by the court, and may allow such child to remain in its home subject to the visitation and control of the probation of the probation officer, such child to report to the probation officer as often as may be required, and to be subject to be returned to the court for further proceedings whenever such action may appear to the court to be necessary; or the court may authorize the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer and the further order of the court, or it may authorize the child to be boarded out in some suitable family home, in case provision is made by voluntary contribution or otherwise for

payment of the board of such child, until suitable provision may be made for the child in a home without such payment; or the court may commit the child, if a boy, to the Missouri training school for boys, or, if a girl, to the state industrial school for girls; or the court may commit the child to any institution within the county, incorporated under the laws of this state, that may care for children, or to any institution which now or hereafter may be established by the state or county for the care of boys or girls, or to any special truant or parental school which now or hereafter may be established by the board of education of said county."

This section, as you will observe, makes no direction concerning who shall execute the commitment, if a child is committed to the Missouri Training School for Boys. Nor is there any other section in this article which makes any such provision. The only section which could have any bearing on the question is Section 9695:

"Nothing in this article shall be construed to repeal any portion of the law relating to the state industrial home for girls or the Missouri training school for boys; and in all commitments to either of said institutions the law in reference to said institutions shall govern the same."

Section 9004, R. S. Mo., 1939, directs who shall execute the commitment in the event a minor is ordered confined to the Missouri Training School for Boys for conviction of a criminal offense. No mention is made concerning the carrying out of an order confining a juvenile delinquent to the same institution.

CONCLUSION

The purpose of the act is the reformation of the juvenile delinquents. As the act fails to direct who shall

Hon. L. M. Bywaters

-4-

March 31, 1943

carry out the orders of the Juvenile Court, when a delinquent is committed to an institution, it would seem to be within the discretion of the Judge of the court to make such direction as he deems proper for the carrying out of his judgment. The order could be directed to the sheriff, to the probation officer or to any other person the judge considers proper.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

COUNTY BUDGET: Failure to include county health officer's salary in budget does not relieve the county of the obligation.

April 23, 1943

Dr. S. B. Buck
County Health Commissioner
McDonald County
Anderson, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of April 20, 1943, which reads as follows:

"As you know last fall in the election a number of new officers were elected to offices, this being the case with our county Court and County Clerk in making the Budget they failed to budget the County Health Officer. Is there any way that they can amend this so that I can get my salary?

"They want to pay me but say they cannot do it under the circumstances. I told them that I would write you as County Health Officer and get an opinion."

Section 9745 R..S. Missouri, 1939, partially reads as follows:

" * * * If a county court of any county decides to appoint a deputy health commissioner, as empowered in this law, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

In giving our opinion on this request we are assuming that the county court duly appointed you as deputy health commissioner and agreed with you as to the compensation and expenses to be paid for such services. If an agreement was made it is a statutory salary, as provided by the above section.

The Supreme Court of this State has held that where a salary is fixed by the legislature, such as by an agreement, the county court's failure to include the salary of the county officer in the budget does not relieve the county of the obligation to pay the same. It was so held in the case of *Gill v. Buchanan County*, 142 S. W. (2d) 665, 1. c. 668, where the court said:

" * * * This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.'
Traub v. Buchanan County, 341 Mo. 727, 108 S. W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation im-

Dr. S. E. Buck

(3)

April 23, 1943

posed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

CONCLUSION

It is, therefore, the opinion of this department, that if the county court duly appointed you as county health officer, and agreed with you as to your salary, they should pay you that salary even though the same was not included in the county budget.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CITIES OF THE
THIRD CLASS:

Sinking funds cannot be invested in United
States Bonds.

May 6, 1943



Hon. John B. Busch
City Attorney
Washington, Missouri

Dear Mr. Busch:

Under date of April 27, 1943, you wrote this office
requesting an opinion as follows:

"The City of Washington is desirous
of investing some of the money it has
on hand in several bond sinking funds
in United States War Bonds. It is the
cities plan to purchase War Bonds which
would mature before the money would be
needed to retire the bonds issued by
the city, and from whose sinking fund the
money would be taken. The money neces-
sary to retire the bonds issued by the
city would be available at the time they
mature.

"As Washington is a City of the third
class, I would very much appreciate an
opinion from you, advising whether the
proposed purchase of War Bonds would be
legal."

In answering this request it is necessary to call at-
tention to several sections of the statutes. Section 6945
R. S. Mo., 1939, makes specific provisions for the invest-
ment of sinking funds of cities of the third class and is as
follows:

"Whenever there shall be in the trea-
sury any money belonging to any sinking
fund of any city of the third class

which cannot be applied to the payment of existing debts for which such fund has been levied and collected, the city council may provide by ordinance for loaning the same at the highest rate of interest that can be obtained, not exceeding eight nor less than ~~nix~~ nine per cent per annum, payable annually, the same to be loaned upon improved real estate in the county in which such city is situated, and for such time as such money cannot be applied to the payment of the debt for which it was levied and collected; no loan shall be for more than fifty per cent of the value of the property given as security, and shall be secured by a deed of trust on the same, and any such lands so taken as security shall be free from all liens or encumbrances. In addition to the security above provided for, the city may require a bond with good and sufficient securities, and no loan shall be made to any person not an inhabitant of the county in which such city is situated, nor shall any person be accepted as security who is not at the time a resident of the county in which such city is situated, and who does not own property equal in value to the sum for which he is security and free from all debts and encumbrance, and exempt from execution and attachment. Before any loan is made on such real estate security, the party applying therefor shall file with the city clerk a complete abstract of title to the land offered as security, and no loan shall be made on any land to which the title is not good. All bonds executed by persons receiving such loans shall be made payable to the city, and shall specify the time when the principal is payable, also state the rate of interest and the time when payable; that in default of payment when due, or failure by principal in the bond to give additional security when the circumstances shall require it, both the principal

and all accrued interest shall become immediately due and payable, and that all interest not punctually paid shall become as principal and bear the same rate of interest as the principal. The city council shall have power from time to time to require additional security to be given on said bond when, in their judgment, it is deemed necessary. If such security shall not be given within ten days after an order to that effect is made by the council, and a copy of said order served upon the borrower, and in all cases where default is made in the payment of the interest, the council shall proceed to enforce the payment of the same according to law; all of which shall be fully provided for by ordinance."

In addition to this section there are Sections 3287 and 3288 which are respectively as follows:

"Whenever the county court, municipal authorities or board of directors of a school district shall decide that it would be more for the interest of the county, city, town, village, township or school district to invest the sinking fund aforesaid in state or United States bonds as aforesaid, instead of county, city, town, village, township or school district bonds, it shall order the treasurer to purchase such bonds as it may designate, who shall thereupon purchase, as soon as possible, as many of such bonds as the funds in his hands will permit, at the lowest and best rates obtainable, and not exceeding the limits to be fixed by such county court, municipal authorities or board of directors; and all such bonds, when purchased, shall be deposited with the treasury of the county, city, town, village, township or school district, or, when there is no treasurer of any such village or township, then

then with the treasurer of the county, to be kept until ordered to be disposed of as hereinafter provided."

(Section 3238)

"Whenever the county court or municipal authorities of any county, city, town, village or township, or the directors of any school district, shall deem it to the best interests of such county, city, village, township or school district to sell the United States, state, county, township, city, village or school district bonds which they may hold, and to invest the proceeds in other bonds, they shall order the treasurer to make the sale and purchase, limiting him as to the prices of both sale and purchase, and the treasurer shall thereupon make such sale and purchase agreeably to the terms and limitations of such order."

These are the sections of the statutes pertinent to your inquiry, the special statute treating specifically and in detail with the investment of sinking funds of cities of the third class and the general section authorizing the investment of sinking funds of countys, cities, villages, towns, townships and school districts in State or United States Bonds.

In construing the statutes, the primary object is to determine the intention of the law makers in enacting the laws under consideration. Running these several sections back, we find that what is now Section 6945 was first enacted as Section 81 (page 80) of a bill enacted by the General Assembly in 1893, Laws of 1893, page 65. The title of this bill was:

"An act to repeal Article 4, of chapter 30, R. S. Mo., 1889, with all amendments thereof, said article being entitled, 'cities of the third class', and to enact in lieu thereof a new article providing for the government of cities of the third class."

At the time of the enactment of this Article and what is now Section 6945, what are now Sections 3827, 3828 herein set out were existing laws and were Sections 841 and 842, R. S. Mo., 1889.

Article 4, chapter 30, R. S. Mo., 1889 treating of cities of the third class which was repealed by the act of 1893, contained no provision concerning the investment of sinking funds of cities of the third class.

Further, in determining the meaning of the statute the history of the act may be considered. *Whitehead vs. Insurance Company*, 60 S. W. (2d) 65. The later special section, having been enacted directing the manner of investing sinking funds of cities of the third class, clearly shows the intention of the Legislature to restrict the investment of such funds to the manner provided in this special act.

When a situation exists where there is one section of the law treating of a manner generally and another section treating of the same matter in detail, the section treating of the subject matter in detail will be considered an exception to the general law. *State ex inf., McKittrick vs. Carolene Products Co.*, 144 S. W. (2d) 153 l. c. 156, 346 Mo., 1049:

"Now, in regard to the senate bill, Section 12413, we have already found that it is very similar to Section 12408, with the exception that it does not name emulsified cream. It is our duty to keep the legislative intent in mind, if it can be ascertained, and the whole act, or such portions thereof as are *pari materia* should be construed together. *Holder v. Elms Hotel Co.*, *supra*.

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to

the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Quoted with approval in the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S. W. 129, loc.cit. 132.

"Sections 12408 and 12413 are general statutes dealing with milk to which has been added fat or oil other than milk fat. Section 12409 deals with the same subject in a more minute and definite way, and being special it will prevail over Sections 12408 and 12413. Considering the statutes dealing with this subject as a whole, we conclude the intent of the Legislature was to prohibit the sale of filled milk, and that filled milk is only that milk to which has been added fat or oil other than milk fat 'so that the resulting product is in imitation or semblance of milk, cream or skim milk,' and that if the product does not come within the statutory definition of filled milk it can be lawfully sold in this state."

This principle of law is so well established it is not considered necessary to cite other authorities.

CONCLUSION

The Legislature having prescribed in detail by a special statute, the manner in which sinking funds of cities of the third class may be invested in real estate loans, there is no law which would authorize the investing of such funds in United States bonds.

APPROVED:

Respectfully submitted,

ROY McKITTRICK
Attorney General

W. O. Jackson
Assistant Attorney General

MARRIAGES: Order of Circuit or Probate Court for issuance of a marriage license immediately should be followed by the Recorder of Deeds.

July 1, 1943

Mr. John A. Byrne
Clerk of the Circuit Court and
Ex-officio Recorder
Knox County
Edina, Missouri



Dear Sir:

We are in receipt of your letter of June 28th, 1943, in which you request an opinion from this department, as follows:

"Because of the attitude of our Probate Judge in the matter of making orders for the issuance of Marriage Licenses immediately, I am asking an opinion from your office in the following cases:

"1. A couple coming in from an adjoining State who are not aware of this new marriage law which requires a wait of three days. Probate Judge holds that he may order the issuance immediately.

"2. A boy in the service who is home on a furlough must return to duty before the three day period has expired. Is this sufficient reason for obtaining order from Probate Court?

"3. Is this office required to issue the Marriage License upon an order by the Probate or Circuit Court even though there is no unusual condition present.

"I am not quite clear as to whether or not an application received by telephone or in

writing can be accepted by this office.
Please give your opinion in this case,
also."

Section 1, Article VI, of the Constitution, reads as follows:

"The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts."

Under the above section of the Constitution the judicial power is granted to the courts to perform certain duties connected with a judicial function. It was so held in the case of State v. Coleman, 152 S. W. (2d) 640, Par. 8:

"The judicial power granted to the courts by the constitution is the power to perform what is generally recognized as the judicial function--the trying and determining of cases in controversy. It includes those incidental powers which are necessary and proper to the performance of that function. The power to punish civil contempts, as above defined, is, for example, necessary to the existence of a court of equity, and the power to punish as contemnors those who actively interfere with the functioning of any court is equally necessary for its existence."

House Bill No. 20, designated as Section 3364 of Chapter 20, as passed by the Sixty-second General Assembly, reads partially as follows:

"* * * Provided, however, that said license may be issued on order of the Circuit or probate court or a judge thereof in vacation of the County in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable. * * *

Under the above proviso it can readily be seen that the circuit or probate court is performing a judicial function when he passes upon the application wherein he finds a good cause shown, or such unusual conditions as to make such marriage advisable. Clearly this is a judicial function. As to the question of good cause shown the Supreme Court of this state in the case of *Buttinger v. Ely & Walker Dry Goods Co.*, 42 S. W. (2d) 982, Par. 3, said:

"The statute provides that notice of the injury shall be given to the employer not later than thirty days after the accident unless the commission shall find that there was good cause for failure to give such notice. The term 'good cause' has no fixed meaning, but must depend upon the circumstances of each case to be determined by the sound discretion of the court. Words and Phrases First Series, vol. 4, page 3113; Brackett's Case, 126 Me. 365, 138 A. 557; Maryland Casualty Co. v. Robinson, 149 Va. 307, 141 S. E. 225."

In other words, each particular case depends upon the particular facts presented when an application is made to the circuit court or probate court for the issuance of a marriage license at a time earlier than three days from the time the application is made.

Under the Constitution of this state the judicial power is vested solely in the courts and not in the judges. That

the judicial power is vested solely in the courts was held in the case of Clark v. Austin, 101 S. W. (2d) 977, 1. c. 981, where the court, in construing section 1 of Article VI of the Constitution, which vests the judicial power of the state in the courts named in the section, said:

"Under the Constitution of this state, the judicial power is vested solely in the courts. Const. art. 6, sec. 1, and article 3; Missouri River Telegraph Co. v. First Nat. Bank, 74 Ill. 217; In re Day, 181 Ill. 73, 54 N.E. 646, 50 L.R.A. 519: * * * * *

It will be specifically noticed in the partial section of House Bill No. 20, supra, that it specifically states "or a judge thereof in vacation of the County in which said license is applied for." It has been consistently held by the Supreme Court of this state that a judge in vacation is not a court within the constitutional provision defining judicial power, as set out in Section 1 of Article VI of the Constitution of Missouri. The Supreme Court in the case of State v. Lollis, 33 S. W. (2d) 98, Par. 3,4, said:

"It will be noted that the act in question invests the judges of circuit courts in vacation with jurisdiction and authority to hear and determine contests of primary elections. Section 1 of article 6 of the Constitution provides that the judicial power of the state, as to matters of law and equity, except as otherwise provided in the Constitution, shall be vested in the courts named in said section. A judge of a court in vacation is not a court. It, therefore, logically follows that, if the hearing and determination of the contest of a primary election in the manner provided in said act is the exercise of judicial power, a law which attempts to confer such power on a judge in vacation would be in violation of section 1 of article 6 of the Constitution which lodges such power in the courts."

This case was where a judge of a circuit court in vacation attempted to decide a matter of law in reference to an election contest.

Later on, the Supreme Court, in the case of State v. Duncan, 63 S. W. (2d) 135, approved the holding in the case of State v. Lollis, supra. In the case of State v. Duncan, 63 S. W. (2d) 135, 1. c. 142, the court, in approving State v. Lollis, supra, said:

"The section next says if the petition be filed and presented in vacation the judge to whom it is presented shall forthwith convene the court in special session for the hearing of the contest. If the petition should be presented to the judge of an adjoining circuit, it may be doubted whether he could convene in special session the court of another county and circuit, where the suit is pending, of which he is not judge, or whether he could 'designate the day' when that court would hold the hearing (as the section provides a few lines earlier), but these objections are not made by relator, nor would they affect the operation of the act in most cases or invalidate it as a whole."

The court in that case also, at page 143, said:

"Likewise, in considering a cause involving what is now section 2, R. S. 1929 (Mo. St. Ann., Sec. 2), authorizing a probate judge in vacation to refuse letters and dispense with a probate administration, this court held in Parsons v. Harvey, 281 Mo. 413, 421, et seq., 221 S. W. 21, 23, the statute was constitutional, and, citing earlier cases, that section 1, art. 6, supra, of our Constitution, does not forbid the exer-

cise in vacation of quasi judicial powers subsidiary to the case pending, but is aimed at the trial of issues and pronouncement of judgment. And, although the statute did not expressly require confirmation by the probate court in term of the action taken in vacation, this court said the vacation order would not be final, and that parties aggrieved could challenge the action of the judge by taking timely steps before the court. On the broad question of what is judicial power, see, also, Johnson v. Wabash R. Co., 259 Mo. 534, 543, 168 S. W. 713, 715; Lusk v. Atkinson, 268 Mo. 109, 116, 186 S. W. 703, 704; State ex rel. Phillips v. Barton, 300 Mo. 76, 86, 254 S. W. 85, 87; Ex parte Lewis, 328 Mo. 843, 846, 42 S. W. (2d) 21, 22."

This case was also an election contest, but the act under which the contest was brought provides specifically that if a petition for the contest was filed and presented in vacation the judge to whom it is presented shall forthwith convene the court in special session in hearing for the contest.

Under House Bill No. 20, supra, there is no provision that the court in vacation shall immediately convene court in a special session. In view of the above cases and authorities that part of the proviso which reads "a judge thereof in vacation" is unconstitutional and the only way that a license can be allowed by the probate court or circuit court is when the court is in session.

As said before, good cause shown, depends on the particular facts in each case and if the circuit court or probate court find that there is sufficient reason for ordering the issuance of a marriage license without requiring the three days' notice, that is purely a judicial matter and is final.

CONCLUSION

It is, therefore, the opinion of this department that if a probate court or a circuit court, or a judge of either court, when in session, makes an order for the issuance of

a marriage license immediately that order should be followed by the recorder of deeds and the license issued.

In answer to the latter part of your request, in reference to the mode of making application, we are herein enclosing a copy of an opinion rendered by this office on June 4, 1943, to the Honorable Mark Morris, Prosecuting Attorney, Pike County, Bowling Green, Missouri, in which we held that an application for marriage license under the provisions of Section 3364 of House Bill No. 20, enacted by the 62nd General Assembly, need not be personally presented to the Recorder of Deeds by the persons desiring to procure the license to marry. It may be mailed or sent by messenger and if properly executed and shows the persons qualified to contract matrimony, the Recorder of Deeds may issue the license.

The conclusion in the enclosed opinion does not cover applications by telephone, but, in reading the law as cited in the opinion, a telephone call would be sufficient the same as if the application was mailed or sent by messenger.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WJB:CP

SHERIFFS AND CONSTABLES:

Sheriffs and Constables, within the jurisdiction of his (the Constable's) justice, may summarily seize gambling devices.

July 17, 1943

121
FILED
13

Hon. C. B. Burns
Prosecuting Attorney
Linn County, Missouri
Brookfield, Missouri

Dear Mr. Burns:

Your opinion request of July 16, 1943, has been assigned to the writer for answer. Therein you ask:

"If a sheriff of the county or a policeman of the city observe gambling devices, may they take charge of same without any other proceedings or anything being filed in any court?"

"Is it the duty of a sheriff of the county and a policeman of the city to take charge of a gambling device when observed in a county or city?"

Your question deals with no specific article that maybe used for gambling, for example cards, roulette, A B C tables or so on. For complete regulations on gambling and articles used therefor see Missouri Statutes for 1939, general index Gaming and Gambling, page 4784, Vol. III.

The cities of various classes are authorized to suppress or regulate gambling, see index of Missouri Statutes, 1939. Cities of the third class have the power to suppress gambling under Section 6950, Missouri Revised Statutes 1939. Cities of the fourth class have the power to regulate gambling under Sections 7169 and 7196, Mo. R. S., 1939.

As to whether or not a sheriff or policeman may take (seize) charge of gambling devices "without any proceedings or anything being filed", the case of State vs. Frankenhoff, 125 S. W. (2d) 816, is applicable.

July 17, 1943

Therein the Court said:

"* * * Constables have the same powers as sheriffs within the jurisdiction of the justice. Huhn v. Lang, 122 Mo. 600, 27 S. W. 345. As to powers of sheriffs, see Section 11516, R. S. Missouri 1929, Mo. St. Ann. Sec. 11516, page 7435.

* * * * *

"* * * we have held that a search warrant is not in every case necessary to authorize a search for and seizure of illegal property such as gambling devices. State vs. Pigg, 312 Mo. 212, 278 S. W. 1030; State vs. Askew, 331 Mo. 684, 56 S. W. 2d 52; State ex rel. vs. Joynt, 341 Mo. 788, 110 S. W. 2d 737, 739; that only 'unreasonable' searches are prohibited by our constitution, and that gambling devices, incapable of lawful use, are not protected by law and may be summarily seized and destroyed.* * *"

CONCLUSION

Sheriffs and Constables, within the jurisdiction of his (the Constable's) justice, may summarily seize gambling devices.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney-General

APPROVED BY:

ROY McKITTRICK
Attorney-General of Missouri

WCB:mcb

PROBATE JUDGE: Not authorized to appoint a deputy judge.

August 24, 1943

8/26



Hon. L. M. Bywaters
Assistant Prosecuting Attorney
Liberty, Missouri

Dear Mr. Bywaters:

This will acknowledge receipt of your letter of August 20, 1943, in which you request an opinion as follows:

"I would greatly appreciate an opinion from your office on the following question:

"If a Probate Judge is drafted or voluntarily enlists in the Armed Forces of his country, can he legally appoint his clerk or anyone possessing the qualifications of a Probate Judge as his deputy, to take charge of his office and serve out his term during his absence?

"Sections 2458 and 2462 of the Revised Statutes of Missouri of 1939 make provisions for the selection or appointment of a Probate Judge in cases wherein he cannot serve by reason of disability, but I can find nothing in the statutes applicable to the above situation.

"Your cooperation and assistance in this connection will be greatly appreciated."

There is no statute which would authorize the appointing of an assistant judge or deputy judge by a probate judge upon

his entrance into the military service. To arrive at the answer to your question it is necessary to refer to the case books and text books.

In Missouri, following the common law rule, it is recognized that without statutory authority a ministerial officer may appoint a deputy to perform purely ministerial acts. *Hunter v. Hemphill*, 6 Mo. 10; *Small v. Field*, 102 Mo. 104. An officer who has duties involving the exercise of discretion and also ministerial duties may delegate to an assistant or deputy the performance of the ministerial duties but cannot delegate the performance of the duties which involve an exercise of his official discretion. *State ex rel. Shrainka Construction Co. v. Reber et al.*, 226 Mo. 229.

The same rule concerning the delegation of discretionary duties to an assistant is recognized and well established in other jurisdictions, a Kansas case and a Kentucky case each announcing the same rule are here cited and quoted from:

Moore v. Wilson (Kans. Sup.), 115 Pac. 548, 1. c. 549:

"The contention is that the duties devolving on the commissioner involved the exercise of judgment and discretion, and that, in the absence of statutory authority, no deputy could be appointed to act in his stead. The statute does empower the commissioner to appoint a clerk, a stenographer, inspectors for stockyards; to employ laborers to assist him when necessary; and to call on sheriffs and constables to execute his orders; but it is conceded that there is no statute empowering him to appoint a deputy. The general rule is that official duties of a ministerial character may be delegated to another, but those requiring the exercise of judgment and discretion cannot, unless specific statutory authority to do so is given. Likewise officers chosen because of their experience or

special fitness and capacity are not permitted to delegate or intrust such duties to deputies or other persons. The same rule has been applied to arbitrators, executors, guardians, and public trustees, in whom personal trust is confided, or who were chosen because of certain qualifications. Mechem on Agency, Secs. 188, 190. At common law officers could appoint deputies for the discharge of mere ministerial duties; but they had no authority to intrust to deputies the performance of duties of a judicial nature, or those involving judgment and discretion. In a general way, it may be said that the presumption of the law is that an office is to be held and executed by the one chosen for it, and especially where it is necessary that the officer shall possess particular qualifications. In Mechem on Public Officers, Sec. 567, it is said: 'In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment and discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another.'

"In *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423, it was held that a marshal of a city of the second class could not appoint a deputy to act for him, in the absence of a statute or an ordinance authorizing it. In *State v. Hastings*, 10 Wis. 525, it was held that certain duties imposed on the Secretary of State could not be delegated to a deputy or an assistant. It was also held that a board of health could not delegate to others statutory power and discretion

specially vested in the board. Young v. County of Blackhawk, 66 Iowa, 460, 23 N. W. 923. In New York it has been held that a board of excise, whose duties involved confidence and a trust to be exercised for the public good, could not delegate its authority to another. Board of Excise v. Sackrider, 35 N. Y. 154. In Powell v. Tuttle, 3 N. Y. 396, it was held that, if the duties are partly ministerial and partly of a judicial nature, the former may be committed to a deputy, but that the latter could not be delegated. In State ex rel. v. Reber, 226 Mo. 229, 126 S. W. 397, where the duties of an officer, in a tax transaction, included some which involved discretion, and, following the performance of the duties involving the exercise of discretionary power, others of a ministerial character were to be performed, the court held that the officer, having personally performed those involving discretion, might authorize other persons to perform the remaining ones. In the syllabus it was said: 'An officer, to whom a discretion is intrusted by law, cannot delegate to another the exercise thereof, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act, such as signing instruments, to evidence the result of his own exercise of the discretion.' 126 S. W. 397, syl. par. 3. See, also, Coffee v. Tucker, 7 Humph. (Tenn.) 49; Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790; Robinson v. Chapline, 9 Iowa, 91; People ex rel. Board of Charities v. Davis, 22 Hun (N. Y.) 209; Mechem on Agency, Sec. 190; 1 A. & E. Encyc'l of L. 975; 22 A&E. Encyc'l of L. 365; 29 Cyc. 1395."

Monroes' Guardian v. Monroe (Court of Appeals of Kentucky), 285 S. W. 250:

"The first question raised is whether or not a deputy circuit clerk may appoint a guardian ad litem. The guardian ad litem in this case was appointed pursuant to section 38 of the Civil Code by the deputy clerk of Nelson circuit court at a time when that circuit court was in vacation. It is conceded that, had the clerk himself appointed this guardian ad litem, the appointment would have been valid, but it is insisted that a deputy clerk has no power to make such an appointment, and the case of Payton v. McQuown, 97 Ky. 757, 31 S. W. 874, 31 L. R. A. 33, 53 Am. St. Rep. 437, is cited and relied upon. In that case it was held that a deputy clerk could not grant a restraining order or temporary injunction, although the circuit clerk would under the facts have had the power to do so. In that case it was pointed out that, although section 678 of the Civil Code provides that 'any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy,' yet as the granting of a restraining order or temporary injunction is a judicial or quasi judicial act, the authority to do so could not be delegated and hence could not be done by a deputy clerk. It is well settled that, in the absence of statutory authority, a deputy may not perform for his principal any duties judicial or quasi judicial in their nature, but that he may perform all other acts which his principal is authorized to do. * * * * *

The following brief quotation stating the same rule is taken from Corpus Juris, Vol. 46, page 1063, par. 384:

"Without statutory authority, deputies have no power with respect to the duties of an office involving the exercise of judgment and discretion, but all ministerial duties pertaining to the office which the principal could perform may be performed by a deputy.
* * * * *

Also in Mechem on Public Officers is found the following, Section 569, page 371:

"A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him; because his judgment is relied on in matters relating to his office, which might be the reason of making the grant to him; neither can a ministerial officer depute one in his stead, if the office be to be performed by him in person; but when nothing is required but a superintendency in the office, he may make a deputy.

"It is clear that the judges of Westminster Hall, as well as all others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, nor in any way transfer their power to another."

The duties of a probate judge frequently require the exercise of a judicial discretion and at times are purely ministerial.

Conclusion.

As there is no statutory authority for the appointment of a deputy or an assistant by a probate judge, a probate judge cannot appoint a deputy or assistant and confer on such deputy or assistant power to perform the duties of the office

Hon. L. M. Bywaters

-7-

August 24, 1943

which involve the exercise of discretion. However, a probate judge may delegate to a clerk or an assistant the performance of the purely ministerial duties of the office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WOJ:EG

TAXATION: Ad valorem tax of merchant who ceases doing business before first Monday in June; on merchants who commence doing business after first Monday in June.

October 28, 1943.

Mr. Clyde E. Buzzard,
Assessor of Newton County,
Neosho, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of September 9, 1943, as follows:

"We have recently written the State Tax Commission in regard to Merchants Tax and they referred us to our County Attorney and he in turn referred us to you for your opinion in the following instance:

"A files Merchant Statement in June. In August he sells stock of Merchandise to B.

- "1. Should A pay all of Merchants Tax as shown on statement? Or
- "2. Should B file a new statement when he takes over the business?

"3. If this is to be prorated or divided is B obligated by A's statement?"

Section 11309, R. S. Mo. 1939, provides:

"On the first Monday in June in each year it shall be the duty of each person, corporation or copartnership or persons, as provided by this article to furnish to the assessor of the county * * * a statement of the greatest amount of goods, wares and merchandise, which he or they have had on hand at any one time between the first Monday in March and the first Monday in June next preceding,* *."

While this section uses the words "June next preceding" such language has been held to mean the June next following the month of March, in the same year. State ex rel. Fisher v. Rodecker, 145 Mo. 450, 458.

Based upon this return the assessor places a valuation upon the property and the same is extended upon the tax books, at the same rate as is levied upon real estate. Section 11305, R. S. Mo. 1939. Thereafter, on the first of January next following, the tax must be paid to the collector of the county. Section 11306, R. S. Mo. 1939. Bond must be given to insure payment of this tax, and where not paid the bond is deemed forfeited and judgment may be taken for double the amount due. Section 11315, R. S. Mo. 1939. Likewise a similar provision is made with respect to failure to file the statement except in that case judgment may be taken for three times the amount due. Section 11316, R. S. Mo. 1939.

State ex rel. Fisher v. Rodecker, 145 Mo. 450, was an action on such bond for failure to file the statement. Defendants contended that since they had ceased to do business as merchants before June 1st of said year, they were not amenable to the tax and therefore not required to file the statement. In answer to this contention the court said (l.c.460-1):

"* * * if at any time between the first Monday in March and the first Monday in June of that year, Rodecker and Cohen were engaged in selling goods, wares, and merchandise at Bates county it was their duty on the first Monday in June in that year to file in the office of the clerk of the county court of that county a statement of the greatest amount of goods, wares, and merchandise which they may have had on hand at any time between those dates, whether they were in fact engaged in the mercantile business on the first Monday of June, 1894, or not."

State ex rel. Nunnelee v. Horton Land & Lbr. Co., 161 Mo. 664, was an action on a manufacturer's tax bond, where the provisions as to filing a statement, payment of the tax and giving a bond were substantially the same as on merchants.

The defendant did not file the statement and such failure was the basis of the action. Defendant attempted to inject in the case the point that it had disposed of the property in question prior to June 1st, though it did not raise that point in the pleadings. On this the court said (l.c. 673):

"* * * Issues can not be tendered by the evidence in a case, and if they could the fact that the defendant's property had changed hands before the first of June, 1896, if such was the fact (of which there was slight evidence brought out on a re-cross-examination of one of plaintiff's witnesses), afforded no defense for defendant's neglect to file the statement required by law,* * *."

These two cases clearly hold merely because a merchant ceases to do business, as such, before the expiration of the period during which he is to compute the taxable property, does not relieve the merchant from the duty to file the statement. Neither is he in our opinion relieved from having to pay the tax, for applying the principle of these cases we see that Section 11303, R. S. Mo. 1939, defines a "merchant" as one selling goods at a place occupied for that purpose. And Section 11305, R. S. Mo. 1939, provides:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year: Provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Clearly anyone acting as a merchant on any date between the first Mondays in March and June, is subjected to

the tax. It matters not, that he may cease to so act or may dispose of all his goods, before the expiration of that period, because once he becomes subject to the tax, it must be paid, for no law provides he is to be relieved upon the happening of such contingencies as ceasing to be a merchant or disposing of his goods.

Thus, if the law is that a person who acts as a merchant a single day between the periods fixed is liable, we can see no justification at all for a contention that a merchant who sells his goods out in August is relieved from liability or may be permitted to prorate this liability according to the number of months he acted as a merchant.

Moving now to the proposition as applied to the merchant who acquired, in August, the goods of the first merchant, it appears that Section 11329, R. S. Mo. 1939, provides:

"When any person or corporation shall commence the business of merchandising in any county in this state after the first Monday in June, in any year, he shall execute a bond as provided for in section 11306, conditioned that he will, on the first day of January next succeeding, furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay the same rate of tax as other merchants, to be estimated as the time from the day on which he commenced business to the first Monday in June next succeeding shall be to one year."

This section is unambiguous and needs no exposition. It is designed to and does require a merchant commencing business, as such, after the first Monday in June, to file a statement of the greatest amount of goods on hand between the time he commenced business and the end of the year. Upon that statement he must, on the following January 1st, pay an ad valorem

tax, but in this instance the tax is prorated as the time from the day on which he commenced business to the first Monday in June of the next year, is to one year.

C O N C L U S I O N

It, therefore, is our opinion that Merchant "A", having acted as a merchant during the period from the first Monday in March to the first Monday in June, in a year, is liable for the full ad valorem tax on merchants even though he may cease to act as a merchant and sell all his goods during or after said period. Merchant "B" having acquired the goods of "A", after the first Monday in June, upon acting as a merchant, is also liable for an ad valorem tax, but it is to be prorated under the formula set forth in Section 11329. The taxes of each are distinct and what "A" may be liable for and pay, has no bearing upon what "B" may be liable for and pay. And in the converse, what "B" may be liable for and pay, has no bearing upon what "A" may be liable for and pay.

Respectfully submitted,

LAWRENCE L. BRADLEY,
Assistant Attorney General.

APPROVED:

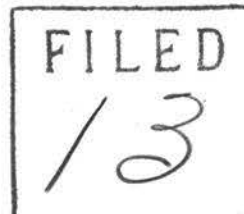
ROY McKITTRICK,
Attorney-General.

LLB/LD

CRIMINAL COSTS: Taxed costs shall include meals, and
PAROLEE: be paid by parolee.

December 2, 1943

Mr. L. M. Bywaters
Assistant Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of November 19, 1943, which request reads:

"The question has been raised and I would appreciate the opinion of your department, on the following matter: Is it proper in cases of parole to require the parolee to pay, as part of the criminal cost, the board bill for the time that he spent in the County Jail awaiting trial?

"I have searched the Statutes diligently in this connection and I have been unable to determine whether or not a board bill should be included in such cost. If your department will render me an opinion it will be greatly appreciated not only by myself, but by Judge Rooney, Circuit Judge, and Mr. Frank Prewitt, Circuit Clerk of Clay County.

"Thanking you for your cooperation and assistance in this connection, *****"

Costs were unknown to the common law, and hence one's right to costs is wholly dependent on statutory provisions allowing them, and such statutes are to be strictly construed.

In the case of In re Thomasson, 159 S. W. (2d) 626, 1. c. 628, affirming 119 S. W. (2d) 433, the court said:

"* * * In the first place costs were unknown to the common law and one's right to costs is now wholly dependent on statutory provisions allowing them. And such statutes are strictly construed. 7 R.C.L., Sec. 2, p. 781; Van Trump v. Sanneman, 193 Mo. App. 617, 187 S. W. 124; Ex parte Nelson, 253 Mo. 627, 162 S. W. 167. There being no statute specifically allowing costs in such instances or under such circumstances or in such a manner is sufficient to exclude the claims of the appellant. * * * * *

There are many statutes relative to taxing costs in both civil and criminal cases, and under all kinds of conditions and circumstances. In many instances the courts have held the court has much discretion in assessing costs against the various litigants.

Under Section 13416, R. S. Mo. 1939, the sheriff is entitled to board for each meal in an amount not to exceed seventy-five cents per day as fixed by the county court. Section 13416, reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

In reading Section 13774, R. S. Mo. 1939, we are inclined to believe that whoever is taxed with the costs in such case shall pay for all meals consumed from the time the arrest is

made by the officer. Section 13774 reads:

"Hereafter when any person or persons shall be confined in the common jail for any criminal offense, the sheriff or jailer may make out and present to the county court at its regular session, a bill for all board due him for the board of such prisoners; such bill shall specify the offense with which each prisoner is charged, and shall be audited and allowed by such county court, and the clerk thereof directed to draw a warrant for the aggregate amount thereof. When the final determination of any criminal prosecution shall be such as to render the state liable for costs under existing laws, it shall be the duty of such county clerk to certify to the clerk of the circuit or criminal court in which the case was determined, the amount due the county for boarding said prisoners; it shall then be the duty of the clerk of the circuit or criminal court in which the case was determined, to include in the bill of costs against the state, all fees for board of prisoners theretofore paid by the county, setting forth the fact that such fees are due the county, and the fees for board which have accrued since the last payment by the county, shall be stated separately as being due the sheriff or jailer. Such fees due the county when collected by the clerk of the circuit or criminal court shall be immediately paid into the county treasury."

Furthermore, Section 4208, R. S. Mo. 1939, specifically requires the parolee to pay all costs or give security for same and in such case he shall, before final discharge pay all of said costs. Section 4208 reads:

"It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the

payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for nonpayment of fine or costs. Such payment of costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury, as the case may require."

Under Section 13774, supra, there can be no doubt but that meals furnished one incarcerated and awaiting trial are a part of the costs in the case. Furthermore, there is a distinction between one acquitted and one paroled. Parole in no manner means an acquittal or that the parolee is innocent. One of the cardinal rules of statutory construction is to determine the legislative intent, and, if possible, give it that effect, as was stated by the court in *Artophone Corporation v. Coale*, 133 S. W. (2d) 1. c. 347:

"* * * Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10). * *"

CONCLUSION

Therefore, in view of the foregoing statutes and authorities, and especially Section 4208, supra, requiring a parolee to pay all costs before a final discharge, we are of the opinion that such meals are a part of the costs and the parolee shall be taxed the costs in the case, which shall include the charge for meals furnished the parolee while in jail awaiting trial.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

APPROVED:

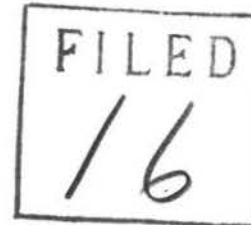
ROY McKITTRICK
Attorney-General

ARH:CP

PROSECUTING ATTORNEY:
OFFICERS :

A tenure of a holdover prosecutor ends when his successor, after election and after a commission is issued, takes the oath of office.

March 3, 1943



Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 1, 1943, which is as follows:

"Under date of December 12, 1942, your office kindly furnished me with an opinion regarding my status as prosecuting attorney of Reynolds County. The effect of this opinion was that I was in office until my successor had been chosen and qualified.

"Today, John A. Johnson, the father, and attorney of John A. Johnson has filed notices on the County Clerk and County Treasurer to the effect that John A. Johnson was elected prosecuting attorney at the last general election in 1942, and is entitled to the salary of such office; that no county warrants for salary are to issue except upon the order of John A. Johnson. A copy of this notice is enclosed for your consideration.

"John A. Johnson has been in the United States Army, presumably for the past several months in Australia. It appears that he has taken the oath of office, and that his commission is to be sent to the Reynolds County Clerk for recordation within a few days, but that he is not now, nor is he likely to be in Reynolds County for a long time in the future.

"Mr. Johnson was elected at the general election of 1942, and I would like it understood that I do not wish to make any effort to deny

March 3, 1943

him the office if he is the legally the prosecuting attorney. If you should hold that he is now the prosecuting attorney, then I do not propose to do any further work, as he is entitled to the pay and should do his own work. However, it appears that he was sworn in (if such is actually the case) in order to draw the salary and will not and cannot give the office his own personal attention.

"Your opinion on this matter will be appreciated at your earliest convenience."

In answering your inquiry, we need only to add very little to our opinion to you of December 12, 1942. In that opinion we held that under your appointment to the office of Prosecuting Attorney of Reynolds County, you were entitled to hold the office until a successor was duly elected and qualified. It now appears that Mr. John A. Johnson was elected as your successor at the general election held in November 1942. To date, however, it is not known whether Mr. Johnson has qualified.

After an election is held for prosecuting attorney, the clerk of the county court is required to transmit to the Secretary of State the votes given for each candidate. (Sec. 12937 R.S. Mo. 1939) The Secretary of State then compares the votes given for the respective candidates and certifies to the Governor the person elected (Sec. 12938 R. S. Mo. 1939). Upon the basis of this certification the Governor then issues the commission to the person elected (Sec. 12998 R.S. Mo. 1939). The Secretary of State affixes the seal of the State to said commission and countersigns the same (Sec. 12996 R.S. Mo. 1939). Said officer also keeps a register of said commission (Sec. 12995 R. S. Mo. 1939). Upon receipt of the commission, the prosecutor elect must, before entering upon the discharge of the duties of the office, take the oath prescribed by the Constitution (Sec. 6 Art. 14, Mo. Const.).

The taking of the oath seems to be the last act necessary in order to entitle a prosecutor elect to enter upon the discharge of the duties of the office of Prosecuting Attorney. While it seems to have been the custom for such commission to be

Hon. Paul N. Chitwood

3.

March 3, 1943

recorded with the county clerk (you mention such in your letter) or with the recorder of deeds (See Sec. 13161 R. S. Mo. 1939), we are unable to find any statute which requires that to be done, or makes such a prerequisite to entering upon the discharge of the duties of the office.

CONCLUSION

It therefore is our opinion, that when it appears that John A. Johnson has had a commission issued to him by the Governor and has taken the oath of office prescribed by the Constitution, your tenure as prosecuting attorney of Reynolds County, under appointment by the Governor, is at an end. The mere fact that Mr. Johnson will not and cannot give the office his personal attention due to his presence in Australia on military duty, does not seem to have any bearing on the question. State ex inf. McKittrick v. Wilson 166 S.W. (2d) 499 (Mo. Sup.).

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:AC

OFFICERS:

A committeeman may not qualify as Constitutional Convention delegate.

April 22, 1943

Hon. William Clark
c/o Joseph A. Lennon
Assistant Attorney General
905 Central National Bank Building
St. Louis, Missouri



Dear Mr. Clark:

We are in receipt of a letter from Mr. Joseph A. Lennon's office, which letter is as follows:

"William Clark called at my office several days ago and made inquiries with reference to whether or not an opinion had ever been written by your office concerning the question of the availability of himself and Richard FitzGibbon of St. Louis in serving on the Constitutional Convention. Both of these men, as I understand it, are members of the Democratic City Committee - Fitzgibbon from Kinney's ward and Clark from the 21st Ward in the 13th Congressional District.

"It might be that formal request has been made of you for an opinion on this subject or that an opinion has already been written. I suggested to Mr. Clark that the proper party to request an opinion would be either himself or the Chairman of the Democratic City Committee. However, he asked me to send you this communication to find out whether or not such a request had been made in the past and if not, Mr. Clark is making such a request to ascertain his status."

There is no question but that a committeeman is an officer, within the meaning of the law, and I send you herewith a copy of an opinion written by Hon. J. W. Burke, Assistant Attorney General, dated January 16, 1943, in support of this proposition. Said opinion also holds that the same person cannot be both senator and committeeman at the same time.

Section 3, Article XV of the Constitution of Missouri provides that:

"* * * and each delegate shall possess the qualifications of a senator; and no person holding any other office of trust or profit (national guard officers, school directors, justices of the peace and notaries public excepted) shall be eligible to be elected a delegate to the convention nor during the term for which he shall have been elected or appointed. * * * * *

You will note that the opinion written by Mr. Burke cites from Section 12, Article IV of the Constitution of Missouri, which section is as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

From the above citations, it is obvious that one person cannot be both delegate to the Constitutional Convention and Committeeman.

April 22, 1943

From the language of Section 3, Article XV, above quoted, it seems that one cannot be elected a Delegate to the Constitutional Convention while holding an office of City Committeeman. For further proof that a Committeeman is an officer, I submit herewith an opinion of this office, written by F. J. Allebach, and dated June 10, 1938.

In the case of State v. Bowman, 124 Mo. App. 549, The Springfield Court of Appeals, in discussing the term "officer" and a person holding two offices as being against public policy, said at pages 557 and 558:

"A great statesman has voiced the basic principles governing official conduct by declaring that: 'A public office is a public trust.' Like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase the emoluments of such office; * * * *".

It is quite possible that a committeeman could use his influence as committeeman in securing his election to the office of Delegate to the Constitutional Convention.

CONCLUSION

It is therefore the opinion of this department that a committeeman cannot also be a Delegate to the Constitutional Convention.

It is also our opinion that under Section 3, Article XV of the Constitution, a person holding the office of committeeman is an officer of trust, and is not eligible to be elected a Delegate to the Constitutional Convention.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:NSH

ASSESSORS: May be removed by county court for failure to perform duties and a successor appointed.

May 14, 1943

Honorable Jonathan E. Clarke
Prosecuting Attorney
Lincoln County
Elsberry, Missouri



Dear Sir:

This will acknowledge receipt of your letter of recent date, in which you request an opinion. Your request reads as follows:

"When the Assessor furnishes the County Court the personal property lists with 44% of said lists being unsigned by property owners, is there any duty upon the County Court to question, or liability for failure to question, the Assessor on unsigned lists either with reference to Section 10949, Mo. Rev. Statutes 1939, relating to removal of the Assessor by the Court or any other section of the Statutes respecting criminal liability of the members of the County Court."

Some preliminary discussion will be required before we proceed with our examination and arrive at our conclusion. From the text of this inquiry we cannot discover whether 44% of the lists referred to have been signed by the assessor. The statement reads:

"When the Assessor furnishes the County Court the personal property lists with 44% of said lists being unsigned by property owners, * * *."

May 14, 1943

Under the provisions of our statutes the assessor is under a duty to get a list covering all taxable personal property, or to make one himself. In the case of real estate he is required to put all real estate on his book from his own investigation of former tax books, maps, plats, records and other necessary information. Furthermore, he is required to return his book to the county board of equalization.

Because of the great length of the statutes involved and the decisions examined and other authorities consulted we do not set out in full the text, but merely cite same for your reference and study.

The office of the assessor is dealt with in Chapter 74, Article 2, of our Revised Statutes, and it is deemed necessary to say only that Sections 10945 to 10954 cover the provisions as to his term of office, oath, bond, time for making assessment, procedure in case of failure and a provision for his removal from office.

At Section 10081 R. S. Missouri, 1939, we find he is required to return his book to the county board of equalization, and at Section 10981 R. S. Missouri, 1939, another provision as to how he shall value and assess property. We cite the following cases which may interest you and that concern themselves with the questions as to procedure in the making of assessments. These decisions are State ex rel. Gottlieb v. Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775; Hazard v. Barron, 36 F. 854; Wymore v. Markway, 89 S. W. (2d) 9, 338 Mo. 46; and Wyatt v. Hoyt, 27 S. W. 382, 123 Mo. 348.

An assessor is under a direct duty to get a list, or to make one covering the property in his county. This requirement may be found in Section 10954 R. S. Missouri, 1939. This section takes care of the situation where a taxpayer does not make out a return and in that instance we find the assessor may make a list on his own view. He is within the law when he files a list so made on his own view and information. From the decisions which we shall quote subsequently, this section is directory and not mandatory. The decisions in the following cases are the authorities for this observation: State ex rel. v. Carr, 77 S. W. 543, 178 Mo. 229; State v. Gomer, 101 S. W. (2d) 57, 340 Mo. 107.

May 14, 1943

As to the relation between the county court and the assessor, we find with respect to the assessment, levy of taxes and establishment of rates, etc., that at Sections 11001 to 11008 provision has been made for county boards of equalization. Also, we find at Section 11040 R. S. Missouri, 1939, and 11042 R. S. Missouri, 1939, a detailed statement as to how taxes are assessed, levied and collected, and the further admonition that such assessment, levy and collection may not be made except as provided by statute.

Looking now to this question in your letter:

"Is there any duty upon the county court to question, or liability for failure to question, the Assessor on unsigned lists?"

It occurs to us that the fact that 44% of the lists are unsigned is sufficient notice to put the county court upon inquiry as to the method and procedure employed by your assessor in securing such lists. We shall find out later that the county court has the right to remove an assessor under certain conditions, and we believe the court has sufficient interests in the proper performance of his duty and that they are charged with the duty, the neglect or failure to perform which would result in a neglect of duty on the part of the court.

Section 10949 R. S. Missouri, 1939, states as follows:

"Every assessor who shall fail to perform any duty enjoined upon him by law, in the time prescribed, shall be removed from office by the county court, who shall appoint another in his stead. Such new assessor shall take a like oath and give a like bond as required of the first, and the county court shall enter up judgment summarily upon the bond of such delinquent assessor, against him and his sureties, for such amount as shall be sufficient to complete the assessment of the county."

Before citation of authorities in which the removal of an officer is discussed, the writer concludes the rule to be this:

Where an officer is appointed, for no definite term, the power of appointment also carries with it the power of removal at the discretion of the appointing officer, without cause and without notice. We further find that where an officer has been elected to an office and the power of removal delegated, he can be dismissed only for cause and with notice. This doctrine is well sustained in the decisions and authorities we shall now cite. *State ex rel Denison vs. St. Louis*, 1 S. W. 757, 90 Mo. 1. c. 22; *State ex rel. Mincke, et al., v. Sartorius*, 95 S. W. (2d) 873; *State v. Remmers*, 101 S. W. (2d) 1. c. 72.

In 15 C. J., par. 157, at page 494, the removal and suspension of officers is discussed at length. Also, in 46 C. J., par. 146, at page 984, the statement of the general rule in the United States and at common law. These cases are of particular importance and we now cite them: *State v. Wells*, 210 Mo. 601, 109 S. W. 758; *State v. Davis*, 44 Mo. 129; *State v. Hedrick*, 294 Mo. 21, 241 S. W. 1. c. 416; *Williams v. St. Louis*, 213 Mo. 403, 111 S. W. 1165; *State v. Sheppard*, 192 Mo. 497, 91 S. W. 477.

46 C. J., par. 151, page 987, provides us with information concerning the exact nature of wilful misconduct of an officer or such acts as would constitute neglect of an officer. Among other things discussed we find authorities for the statement: "Not every technical violation of a duty will justify a removal." *State v. Zeigler*, 199 Ia. 392, 202 N. W. 94; *State v. Foley*, 107 Kas. 608, 193 P. 361; *Holliday v. Fields*, 210 Ky. 179, 275 S. W. 642; *Sharpe v. Brown*, 38 Idaho 136, 221 P. 139.

We find it necessary to direct your attention to the section devoted to the necessity of a hearing in the event an officer is to be removed, and, in 46 C. J., par. 160, at page 989, this matter is covered in detail. It will be interesting and profitable to give you the following cases on this matter: *State v. Crandall*, 269 Mo. 44, 190 S. W. 889; *State v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *State v. Walbridge*, 69 Mo. App. 657. Also see *Mechem Pub-*

Honorable Jonathan E. Clarke (5)

May 14, 1943

lic Officers, par. 444, at page 283, and Throop Public Officers, par. 364, at page 359.

At this point we make this observation: From a study and examination of previously quoted authorities, we have found the county court may remove an assessor for failure to perform any of the duties required of him. As to the constitutionality of such a statute, we are not in this instance concerned. Whether an officer removed under these conditions is entitled to a hearing, and to his day in court, we do not now discuss, because that is not raised in your inquiry. There may be some who would question this rule, and we leave it for further study and considerable research.

Having examined in detail the statutes and authorities above, we conclude:

1. An assessor may furnish a personal property list to the county court on his own information, where no list is filed by the taxpayer. See Section 10954 R. S. Mo., 1939.

2. The county court may remove an assessor from office for failure to perform any duty enjoined upon him by law. See Section 10949 R. S. Mo., 1939.

3. The county court under our statutes is required to insist that the assessor complete the assessment of the county, and if he fails to do so may enter up a judgment against him on his bond, and against his sureties for an amount sufficient to complete the assessment of the county.

Further, that judges of the county court are under a positive duty to insist that the statutory requirements be performed by the assessor and if in so doing members of the court refuse, fail or neglect their duty they may, under proper conditions, be charged in this connection with a neglect of duty the same as any other public officer.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General

L. I. MORRIS
Assistant Attorney General

LIM:RW

RECORDER OF DEEDS: Lease of real estate should be recorded.
RECORDING LEASES:

August 6, 1943

Hon. John E. Clarke
Prosecuting Attorney
Elsberry, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"Will you kindly advise me with respect to the following:

"When the Recorder of Deeds is offered a written lease of a farm by the land owner to be filed and not recorded, is it the duty of the Recorder of Deeds to accept the instrument and file the same; or should he collect the fee for recording and record the instrument?

"In the case of Faxon vs. Ridge, 87 Mo. App., page 299, the Kansas City Court of Appeals when considering a written lease with a chattel mortgage feature, which was recorded in the real estate records, held that a two-year lease of real estate is a chattel and was therefore not properly put on the real estate record and should have been on the chattel record alone.

"The recorder is demanding that the instrument be recorded while the landlord is demanding that the instrument be filed. Any help that you can give me in straightening out this matter will be genuinely appreciated."

In the case of Lamar Township v. City of Lamar, 261 Mo. 171, 189, the court in speaking of the powers and duties of public officers said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * * The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

Looking to the statute which prescribes the powers and duties with respect to recording and filing instruments, we find that Section 3468 R. S. Mo. 1939 provides as follows:

"In case any person desires to release any part of the property described in any deed of trust or mortgage by marginal record or deed of release, he shall be permitted to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits or otherwise as now or hereafter provided by law in the case of full release, and the recorder shall note the fact of such partial release on the margin of the record of such deed of trust or, if such release is made by deed of release, shall note the fact of the filing for record of such partial release, and of the presentation of such notes or other obligations, or accounting therefor, on such notes or obligations in substantially the following form: 'See partial release dated _____ Recorder' and on the margin of the record of such deed of trust or mortgage, but shall not cancel such notes or other obligations; and nothing in this section shall be construed as making it necessary for

any trustee named in the mortgage or deed of trust to join in such partial deed of release."

This section applies to personal property. In your letter you refer to the opinion in the case of Faxon v. Ridge, 87 Mo. App. 299, wherein the court held that a leasehold interest was a chattel real. At l.c. 308 the court in discussing the interest conveyed by a lease said:

"The interest conveyed by the lease being a chattel and the drugstore fixtures also being chattels, it may, therefore, be said that the lease conveyed only one kind of property, viz.: personalty, and therefore it was not properly put on the real estate record at all, and should have been placed on the chattel record alone. But a lease, while a chattel, is a chattel real and there is a difference between it and chattels personal. Besides, the statute influences the situation at this juncture. It reads as follows: 'Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.' R. S. 1899, sec. 923. The lease paper, though a chattel, was certainly an instrument which 'affected' real estate in the sense of that statute. It was therefore necessary to the protection of the lessor, that it be recorded in the real estate records and being thus properly recorded for that purpose, it, as we have already seen, made a sufficient recording of the personal chattels proper."

August 6, 1943

Section 3426 R. S. 1939 is in the same language as Section 923 R. S. 1899 which is quoted in the Ridge case, supra.

In the case of *Kelvinator St. Louis v. Schader*, 39 S. W. (2d) 385, 389, in discussing this section, the court said:

"It will be observed that section 3039 of our statute not only requires that every instrument in writing that conveys real estate shall be proved or acknowledged and certified in the manner prescribed and shall be recorded in the county in which such real estate is situated, but it also requires that every instrument in writing, whereby any real estate may be affected, shall likewise be proved or acknowledged and certified and recorded in the office in the county in which such real estate is situated.
* * * *"

These cases hold that the lease which affects real estate should be recorded.

CONCLUSION.

From the foregoing, it is the opinion of this department that a duly executed lease to farm land should be recorded when presented to the recorder.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:PD

COUNTY ASSESSOR:

Trustee should furnish Assessor a list of property held as trustee. Liability in case of failure to do so.

TAXATION:

September 22, 1943

9/28

Mr. George R. Clark,
Assessor,
Jackson County,
Kansas City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"The major banks of Kansas City are refusing to furnish this office with lists of Personal Property held in trust by the trust departments.

"They have informed this Officer that by furnishing such lists for information would be a betrayal of their trust.

"I respectfully request that you furnish me an opinion as to the liability of these banks and the manner in which this Officer should proceed."

In State ex rel. Compton v. Buder, 308 Mo. 253, l.c. 260, it was held that taxing statutes shall be strictly construed. In so holding the Court said:

"Citation of authority is entirely unnecessary in support of the well recognized rule that taxing statutes must be strictly construed. * * * * *

In Section 10950, R. S. Missouri 1939, we find that persons having under their care, charge or management property are required to list said property for assessment purposes, and reads:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain: first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1937, and every year thereafter, anything in this or any other section to the contrary notwithstanding; second, a list of all the livestock, showing the number of horses, mares, and geldings, and their value; the number of asses and jennets, and their value; and the number of mules and their value; the number of neat cattle, and their value; the number of sheep, and their value; the number of hogs and their value and all other live stock and its value; third, an aggregate statement of all the farm machinery and implements, and their value; fourth, a statement of household property, including the number of pianos and other musical instruments, clocks, watches, chains

and appendages, sewing machines, gold and silver plates, jewelry, household and kitchen furniture, and the value thereof; fifth, money on hand; sixth, money deposited in any bank, or other safe place; seventh, an aggregate statement of solvent notes unsecured by mortgage or deed of trust; eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust; ninth, an aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies; tenth, the number of bee colonies and their value; ten and one-half, all motor vehicles and their value; eleventh, all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 11309 and 11339, R. S. 1939), and its value; under this head shall be included all shares of stock or interest held in steamboats, keelboats, wharfboats, and other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all vehicles used in the transportation of persons (except of railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation. The word 'list' as used in Section 10996 of this Chapter shall include all the lists required under this section to be taken."

In Volume 61, C. J., Section 765, page 624, we find the general principle as to who shall list property for assessment. Said Section reads as follows:

"The person who should list property for taxation is the owner thereof, or, where it is held by one person for another, and the statutes so provide, the person who

has the custody, possession, control, or management thereof as agent, assignee, trustee, guardian, executor, administrator, receiver, or warehouseman. Some, but not other, statutes requiring listing apply to nonresident owners of taxable property."

There is no doubt but that the Legislature is authorized to require receivers, trustees and assignees to return property in their possession for taxation. In *Interstate Forwarding Co. v. Vineyard*, 3 S. W. (2d) 947, 1. c. 952, the Supreme Court of Texas held that under a similar statutory provision as Section 10950, supra, it required a warehouseman to furnish a list of all property stored to the assessor when demanded by said assessor, and the Court, in writing a very comprehensive opinion, held that the Legislature had a right to enact such provision and the Act was valid. In so holding the Court said:

"* * * Said article 7243 not only gives the right, but we think makes it the duty, of a tax assessor, to demand of any person in charge of a warehouse a list of the property stored in such warehouse, together with a list of the names of the owners of such property and their residences. * * *

"* * * There can be no question but that said article 7243 granted to appellee, as tax assessor of Dallas county, the power to demand of appellant that it furnish a list of the property stored in the warehouse conducted by it on the 1st day of January, 1927, together with a list of the names of the owners of such property and their respective residences. This, as an express power, certainly carried with it by necessary implication, in order to keep the act itself from becoming a dead letter, the right to exercise every other power necessary and proper to the execution of the power thus expressly granted. *Lewis' Sutherland, Statutory Construction* (2d Ed.) p. 942."

In *State ex rel. v. Burr*, 143 Mo. 209, 1. c. 214, 215, 216, the Supreme Court, in passing upon the law as to the valid-

ity of the statute requiring a curator or trustee to list property in his care, held it was the duty of a curator to so list property in his care, and indicated the same applies to a trustee. In so holding the Court said:

"The substantial point raised on this appeal is the right of the State to assess and levy the taxes upon the property of a minor against his curator in possession thereof. We can not find that this question has ever been determined by this court though it is not a new one in other States. It is conceded by the learned counsel for defendant that it is competent for the legislature by proper enactment to require taxes to be assessed against a curator in charge of a minor's estate and make it a personal charge against him, but he insists that our legislature has not done so. By section 7531 the assessor or his deputies are required between the first days of June and January 'to call at the office, place of doing business, or residence of each person required to list property and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person,' and the person listing the property shall enter a true and correct statement of such property in a printed or written blank prepared for that purpose and sign and swear to it. Elsewhere it is provided that from these lists so made the assessor's book is made up, Secs. 7553 and 7564. A curator under our statutes has the possession of the estate of his ward, both real and personal, subject to the superintending control of the probate court. R. S. 1889, sec. 5297. It is his duty to represent his ward in all legal proceedings. That 'the care and management of the ward's estate' conferred by the statute, is such 'care, charge and management' of the estate as is contemplated by the revenue law, we think can not be disputed and is such as makes it incumbent upon him to list it to the assessor. If listed by and assessed to the curator it is his personal duty to pay the taxes out of the moneys in his hands as

curator. The fact that the curator is not the absolute owner of the property is no objection. The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right but that over which he has 'the care, charge, or management.' There can be no reason why a minor's estate should not bear its equal portion of taxation. Who so appropriate then to list it and see that it is not exorbitantly assessed, and who so proper to pay the tax when assessed, as his curator? When it is conceded that a minor's estate is liable to taxation, it is apparent that either directly or indirectly the curator must furnish the funds to pay it, as he has charge of all the estate of the minor.* * "
(Underscoring on page 6 ours.).

Also in State v. Guest, 31 S. W. (2d) 788, 1. c. 790, after quoting from Sections 12756, 12766, 12773 and 12932, R.S. 1919, which are practically the same as Sections 10940, 10950, 10957 and 11112, R. S. 1939, the Court held that it is the duty of every person to list with the assessor all taxable property owned by him or under his care and management. In so holding the Court said:

"From the foregoing it appears that every person owning or holding property on the 1st day of June is liable for the taxes thereon for the ensuing year, that it is the duty of every person to list with the assessor all taxable property owned by him, or under his care, charge, or management, and that personal taxes constitute a debt against the person assessed with such taxes, the person named in the tax bill. If the person who holds or has under his care, charge, and management personal property is liable for the taxes thereon, such taxes may be assessed against him or in his name; and, when so assessed, they constitute a personal debt for which a personal judgment against him may be recovered. Whether the care, charge, and management of personal property devolves upon one as trustee, administrator, executor, or curator, or as agent of a nonresi-

dent principal, is of no consequence; he is made liable for the taxes on the property simply because he has charge and control of it, and not because of the capacity in which he holds it. And when the taxes are assessed against one so holding property, the debt is his and not that of the estate or principal for whom he holds. If such a one pays the taxes assessed against him on account of property in his custody and control as administrator, he is of course entitled to reimbursement from the assets of the estate; but that fact does not make the taxes assessed against him the debt of the estate as between it and the state to whom the debt is owing. State ex rel. v. Burr, 143 Mo. 209, 44 S. W. 1045; Kansas City v. Simpson, 90 Mo. App. 50." (Underscoring ours).

Section 11211, R. S. 1939, defines the word "person" as used herein, and reads in part as follows:

"* * * and the word 'person', as used in this chapter, shall be held to mean and include person, firm, company, corporation or otherwise, whenever the case may so require its use or application."

In view of the foregoing provisions and authorities cited, we conclude that it is clearly the duty of such trustees to furnish you, as assessor, a complete list of all property held in trust by them. Section 10954 authorizes the assessor, whenever there shall be any taxable property in the county, and from any cause, no list thereof shall be given the assessor, the assessor shall make out the list on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching same. Section 10954, R. S. 1939, reads:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own

view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

Section 10955, R. S. Missouri 1939, provides that if any person being notified as aforesaid fails to deliver the required list to the assessor, the property which ought to have been listed shall be assessed at double its value. Said Section reads:

"If any person, being notified as aforesaid, shall fail to deliver the required list to the assessor, the property which ought to have been listed shall be assessed at double its value; and if the assessor shall neglect or refuse so to do, he shall be liable in each case, to a penalty of fifty dollars, to be recovered at the suit of the county, and to be paid into the county school fund."

Under the foregoing provisions the assessor may make an assessment of any property held by a trustee who refuses to submit a list of property held by him, as trustee, for purpose of taxation. In making such assessment the assessor may examine any person under oath as to such property. However, if such person refuses to take an oath and to reveal the necessary information to make a correct assessment, we doubt the authority of the assessor to force such unwilling witness. In case the assessor is unable to obtain the information necessary, then he shall, on his own view or the best information he can obtain, make an assessment, and, further, said assessor shall assess said property at double its value. Furthermore, if said trustee then does not appeal under Section 10992, R. S. Missouri 1939, such assessment, for all purposes, becomes final and valid.

In State ex rel. v. Hoyt, 123 Mo. 348, l. c. 356, the Court said:

"When a tax payer neglects or refuses to furnish a list of his property to the assessor, it becomes the duty of the

assessor to make the assessment 'on his own view, or on the best information he can obtain.' If the owner thinks injustice has been done by the assessor, he has the right to appeal to the board of equalization and have his wrongs remedied. It has been held that the action of the assessor under the revenue law is judicial, and when the jurisdiction to assess the property exists, his valuation, unless appealed from, is conclusive upon the one liable for the taxes. Ins. Company v. Charles, 47 Mo. 462, and cases cited; Railroad v. Maguire, 49 Mo. 483."

CONCLUSION

Therefore, it is the opinion of this department that it is the duty of every trustee, the same as guardian or curator of an estate, to furnish to the assessor a list of property under his care and management. If he refuses to do so, then the assessor shall assess said property on his own view or from the best information he can obtain, and also shall double the valuation of said property for assessment purposes, and if said trustee fails to appeal from said assessment to the County Board of Equalization, as provided by law, then such assessment becomes binding.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

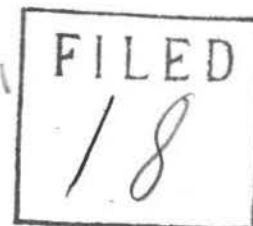
ROY McKITTRICK
Attorney General

ARH:jn

CRIMINAL Submissible case stated under Sec-
LAW: tions 9865 and 9868 R. S. Mo., 1939.

January 9, 1943

Honorable William R. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Collinson:

This will acknowledge receipt of your letter of December 14, 1942, in which you request an opinion as follows:

"At the request of Mr. W. D. Cruce, who is a Supervisor of the Food and Drug Department, I am writing you about a situation which has arisen in this county. In reality, there are two situations, both of which I will outline.

"The first situation involves seizing of poultry by the Food and Drug Commissioner which is tainted, spoiled and unfit for human consumption. This poultry is the property of a wholesale produce company which does not sell at retail and which had the poultry stored in a refrigeration plant here in Springfield. Section 9865 R. S. Mo. 1939, provides it is a crime to 'sell, offer or expose for sale or have in his possession with intent to sell' adulterated or misbranded food. Since all defendants are presumed to be innocent until proven guilty, I fail to see how we could get to the jury in a case of spoiled chickens which were found stored, as these were. The most we could charge would be possession with intent to sell, and since the intent is the

January 9, 1943

essential part of the case, since it would be impossible to prove it by any direct evidence, the only question left would be whether the possession in a cold storage plant would be enough evidence to infer intent to sell. This is one question upon which I would like to have your opinion.

"The second question is this: An inspector from the State Food and Drug Department saw an employee of this produce company sell eight chickens from a barrel of chickens which were on a delivery truck. The chickens were delivered at the meat market from this barrel and the sale can be proved. The eight chickens sold were not examined in any way by the Food Inspector, but he seized the rest of the barrel of chickens and found that part of the remaining chickens in the barrel were tainted chickens unfit for human consumption. We have no direct evidence that the driver of the truck intended to deliver the rest of the chickens to other meat markets or that he intended to deliver the spoiled chickens which were found in the barrel.

"In your opinion, would the possession of these spoiled chickens in the barrel from which some chickens were delivered constitute a crime under Section 9865?

"Mr. Cruce is anxious to bring a case on one of these two situations of chickens. He states that if he cannot push criminal charges on cases like that that the law should be changed and he would like to have a test case to determine how far the statute goes, and

what are his powers in making a criminal prosecution. He is anxious to have your office cooperate in handling a test case of this nature and, of course, I know that you feel like I do, namely, that you would not wish to be a party to a criminal prosecution if there is no possibility of obtaining a conviction.

"I would like to have your opinion on this and your attitude toward the bringing of the test case."

In your letter you mention Section 9865 R. S. Mo., 1939, being the section of the statutes which makes it an offense to sell and have possession of adulterated food with intent to sell the same. Section 9868 R. S. Mo., 1939, defines what shall be considered as adulterated foods and from this section the sixth subdivision is quoted:

"If it consist wholly, or in part, of a diseased, filthy, decomposed, putrid, infected, tainted or rotten animal or vegetable substance, or any part or portion of an animal diseased or otherwise unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or of an animal that has died otherwise than by slaughter, and in case of meats, oysters or fish, sold or offered for sale in the fresh state, if such meats, oysters or fish shall have been inoculated, dusted, powdered, sprayed, rubbed, annointed, washed, sprinkled, fumigated, or in any other manner treated with any of the substances declared deleterious or dangerous by this article, or any antiseptic or chemical preservative or dyestuff whatsoever, whose use and apparent purpose is to mask decomposition, or

or to give to the meat, oysters or fish a false appearance of freshness or quality. And in the case of dairy products, if any such product be drawn or produced from cows fed on unhealthy or unwholesome food, or on waste, slops, refuse, leavings or residue of any nature or kind from distilleries, breweries or vinegar factories, or on food in a state of putrefaction, or from cows diseased in any way."

From reading these two sections it is apparent that the sale of spoiled, tainted, rotten, etc., food or the possession of such food with the intent to sell the same would be an offense.

The statement of facts in your letter is exceedingly brief and we should have appreciated having a statement more in detail.

For the purpose of showing the steps taken in reaching the conclusion of this opinion some elementary law with which you are thoroughly familiar will be set out herein. Of such nature is the following brief statement taken from the case of State v. Beverly, 201 Mo. 550, 558:

" * * * * * The intent of a party in the doing of any particular act is seldom susceptible of positive and direct proof. The intent is a mere invisible resolve of the human mind and ordinarily must be gathered from the acts and conduct of the party charged with the commission of the act. * * * * "

This case was a case of assault with intent to rape. What is there said about intent is considered pertinent to your inquiry as in each instance it would be neces-

sary to allege and prove the specific intent.

The sections of the statutes relating to the sale or possession with intent to sell of misbranded or adulterated foods have not been before the appellate courts on many occasions. No case has been found wherein a ruling has been made as to the sufficiency of the evidence to establish intent where the only evidence before the court was the possession of adulterated food in a stock of merchandise. The case of *State v. Lief*, 248 Mo. 722, was a case in which the defendant was charged in one count of an indictment containing two counts with the offense of possessing adulterated soda water with intent to sell the same. There was a complete failure of proof as to any adulteration, and there is no showing in the reported case as to what evidence of the intent to sell was offered.

It is not considered necessary to cite authority for the statement that the test of whether or not a submissible case is presented is to determine if there is substantial evidence which, with the reasonable inferences that may be drawn therefrom, taken as true on a demurrer, would show prima facie the guilt of the defendant.

Considering the first situation stated in your letter, we have a wholesale produce farm found in possession of spoiled chickens in a refrigeration plant. Possession of the adulterated food is clearly proved. The firm is in the business of selling food and there is stock on hand for that purpose. Would not the inference naturally follow that it was the intention to sell its stock of merchandise? If this is true, that would make a prima facie case.

Under your second situation an employee of the

Hon. Wm. R. Collinson

6
-3-

January 9, 1943

firm was found making deliveries from a barrel containing spoiled chickens intermingled with unspoiled chickens. This barrel had been taken out of the larger stock and placed under the control of an employee who was making deliveries to retail merchants. To the mind of the writer this would also make a prima facie case of the intent to sell the spoiled or adulterated chickens.

It is recognized that under a charge based on either set of facts detailed in your letter a great many defenses could be offered, and this is particularly true about the first set of facts for a small bit of adulterated food could easily be mingled in a large wholesale stock without the knowledge of the owner of the stock or without any intention on the part of the owner to sell such adulterated merchandise. But such other matters as might appear would be matters of defense or extenuation and should be considered by the prosecuting attorney in the exercise of his honest discretion in determining whether or not to file a charge.

Until the law has been definitely settled by having it ruled upon by the appellate courts, it is well to file a test case. If the law is impractical or unconstitutional and the purpose for which it was enacted cannot be accomplished, this should be determined at an early date in order that steps could be taken to make corrections. In connection with the possible filing of a test case, it is the view of the writer that the second state of facts would make a far stronger case than the first set of facts.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

ROAD DISTRICTS:

Specials under Article 10, Chapter 46
R. S. Mo. 1939, may buy rock quarry,
but cannot lease.

July 15, 1943

7/26
FILED

Honorable Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

This will acknowledge receipt of your letter of
June 23, 1943 as follows:

"A special road district in Lafayette County organized and existing under the provisions of Article 10 of Chapter 46 of the 1939 Revised Statutes of Missouri desires to purchase or lease for a period of ninety-nine years twenty acres of land, on which is located a rock quarry and great quantities of rock needed by the special road district for road purposes. The commissioners can save the special road district a considerable amount of money by making an out-right purchase or a long-term lease on the land, rather than buy rock as it is needed for the roads.

"Will you please furnish me with an opinion as to whether or not the special road district can purchase this land and take a deed therefor, or enter into a long-term lease for this land, assuming, of course, that in so doing the special road district does not violate the provisions of Section 8702 of the 1939 Revised Statutes of Missouri."

The law recognizes that Special Road Districts organized under Article 10, Chapter 46, R. S. Mo. 1939, will have to acquire supplies of rock and gravel in connection with construction and maintenance of roads. For example, Section 8683 speaks of "maintaining macadam, gravel, rock or paved roads"; Section 8685 provides that said districts may "repair, grade,

gravel, macadamize, pave or otherwise improve" certain roads; and Section 8700 authorizes such districts to "repair, grade, gravel, macadamize or pave any road in its district".

The powers vested in the Board of Commissioners of such road districts to enable them to carry out their duties are contained in Sections 8682 and 8687, R. S. Mo. 1939. Section 8682 provides in part:

"* * * said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensation, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: * * * * *

It will be noted that this section authorizes the board to "rent, lease, or buy * * * all things needful to carry on such road work", but we do not feel such language, in view of the context in which it appears, is authority for the board to lease or buy a rock quarry. We say this because of the ejusdem generis rule of construction. In *McClaren v. G. S. Robins & Co.*, Mo. Supp., 162 S. W. (2d) 856, 858, it is stated:

"The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified."

It can hardly be said that gravel and rock are of the same general character as teams, implements, tools, machinery and motive power. Consequently, the broad language "all things needful to carry on such road work" cannot be construed as including gravel and rock so that the board can be said to have authority under Section 8682 to "rent, lease or buy" a rock quarry. Particularly is this true when it appears that Section 8687 deals with the board's powers to acquire "material" which

July 15, 1943.

is to be used in constructing, improving or repairing roads.

Section 8687 provides:

"Such board may buy all material which may be used, directly or indirectly, in constructing, improving or repairing any public highway or bridge in its district
* * * *".

In our opinion, gravel and rock are "materials" for use in construction and repair of roads and the authority to acquire such is derived solely from Section 8687. That section does not authorize the board to "rent or lease" such material, but only authorizes the board to "buy" the same. Therefore, it would appear that while the board has authority to buy a rock quarry for the purpose of having a supply of gravel and rock for road purposes, it does not have authority to lease a rock quarry.

CONCLUSION

It therefore is our opinion that a Special Road District organized under Article 10, Chapter 46, R. S. Mo. 1939, has authority to buy a rock quarry in order to obtain rock for road purposes, but that it does not have authority to lease such a quarry.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

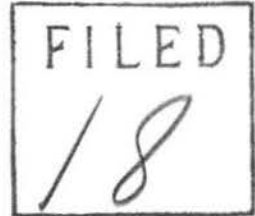
LLB:jn

COUNTIES -) Mandatory that County Court
ROAD OVERSEERS) appoint Road Overseers. Such
appointment may be made any time

September 29, 1943

18/5

Honorable W. E. Coffey
Prosecuting Attorney
St. Francois County
Farmington, Missouri



Dear Sir:

This will acknowledge receipt of your letter under date of September 1, requesting an opinion.

You inquire if it is mandatory upon the County Court under Section 8516 to appoint Road Overseers and if the County Court should appoint said Road Overseers now or wait until February next year; to date no Road Overseers have been appointed; that since 1940 the County has employed a County Highway Engineer in accordance with Section 8660, R. S. Mo. 1939.

The County Court is not a general agent of the County or State, but their powers are limited by statute and any acts beyond the statutory authority are void.

In Morris vs. Karr, 114 S.W. (2d), 962, l.c. 963, the Court said:

"In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

Another cardinal rule of statutory construction is to ascertain, if possible, the intention of the legislature and give it that effect. As was said by the Court in *City of St. Louis vs. Pope*, 126 S.W. (2d), 1201, 1.c. 1210, 344 Mo. 479:

"In the *Senter Commission Company Case*, *City of St. Louis v. Senter Comm. Co.*, 337 Mo. 238, 85 S.W. 2d 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * * this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose'. * * *"

In view of the foregoing, we shall examine the statutory provisions regarding appointment of such Road Overseers. Section 8514, Revised Statutes of Missouri, provides that the County Court of all counties, except those in township organization, shall, in January, 1918, with the advice of the County Highway Engineer, divide the county into road districts, and biennially thereafter the Court shall have the right to change the boundaries of such road districts as to the best interest of the public. Section 8514 reads as follows:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

Section 8516, Revised Statutes, further provides that the County Court shall appoint all Road Overseers and such appointment shall be made at the February term of court. This section reads as follows:

"All road overseers shall be appointed by the county court of the county at the February term of said court. No person shall be eligible to the office of road overseer, except he be a citizen of the road district for which he may be appointed, or of an incorporated town or village, within the bounds of such district and be a practical road builder, or possessed of technical or scientific knowledge of such work (shall be over twenty-one and under sixty years of age and moreover be able to read and write). Such officers shall receive a compensation of not less than two nor more than three dollars per day for each day actually and necessarily employed as such overseer, to be fixed by the county court annually in the month of March, by order of record."

Under Section 8514, supra, we think that the County Court has no discretion regarding the division of the county into road districts; the lawmakers used the word "shall"; and furthermore made one exception as to all counties under township organization. Therefore, unquestionably the legislature definitely intended by making the exception that all other County Courts must divide their respective counties into road districts.

Generally, the use of the word "shall" makes it mandatory; however, this is not always the rule. In *State ex rel. Carpenter vs. City of St. Louis*, 2 S.W. (2d), 713, 1.c. 727, 318 Mo. 870, the Court held that the word "shall" in statute, though imperative where the public has a right which ought to be exercised, may be directory or permissive. In so holding the Court said:

"But respondents call attention to the language of section 7191, that 'such mayor and common council shall direct the proper officer to give notice' so as to submit the matter to a vote, specifying the rate mentioned in the petition. The word 'shall', when used in a statute, is often construed to mean 'may'. It is imperative where the public or persons have rights which ought to be exercised or enforced; but, where no right or benefit depends upon its imperative use, it may be held directory only. 2 Lewis-Sutherland on Statutory Construction, Section 640. The word is

held to be permissive and not mandatory when necessary to sustain or accomplish the purpose of a legislative act. *People v. Fox*, 144 App. Div. 611, 129 N. Y. S. loc. cit. 651. 'Shall' is also construed in the permissive sense to mean 'may' where it is necessary to sustain the constitutionality of a statute. *Spring Creek Dist. v. E. J. & E. Ry. Co.*, 249 Ill. loc. cit. 294, 94 N.E. 529. Courts many times have construed the word 'shall' to mean 'may' under circumstances where it seemed consistent with the legislative intent. With that construction the mayor and common council had discretion either to deny the petition or to submit the proposition to a vote. Having that discretion it was the mayor and common council which fixed the tax rate when they ordered the election, the rate to go into effect contingent upon a favorable vote."

Under such a construction of the word "shall", it will necessitate an inquiry to determine if the public or persons have rights or benefits which would be infringed, or whether or not such rights or benefits do depend upon the appointment of such Road Overseers.

Turning to Section 8516, supra, we find the language used refers to "All Road Overseers shall be appointed by the County Court". Furthermore, under Article 9, Chapter 46, relative to County Highway Engineers, apparently the legislature contemplated that the County Courts in this State shall appoint Road Overseers, for in many instances under the Article it provides for County Highway Engineers supervising and directing the Road Overseers in the various counties.

In view of the foregoing rules and statutory provisions, we are of the opinion that it is mandatory upon the County Court to appoint such Road Overseers in conformity with Section 8516, supra.

As to the time when such appointments may be made, we hold it is not mandatory that such Road Overseers be appointed in February. In so far as possible such appointments should be made during the month of February; however, the decisions in this State have many times held that a statute is directory when specifying the time within which a public officer is to perform an official act, unless the phraseology of such statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer.

The Court in *Schafly v. Baumann*, 108 S.W. (2d), 363, 1.c. 365, 341 Mo. 755, said:

"Appellant, however, contends the provisions of the Jones-Munger Act that such lands 'shall be subject to sale * * * on the first Monday of November of each year' (section 9952a, Mo. St. Ann. p. 7993, supra), that a notice shall be published that such lands 'will be sold * * * on the first Monday in November next thereafter' (section 9952b, Mo. St. Ann. p. 7995, supra), and that 'on the day mentioned in the notice the county collector shall commence the sale of such lands' (section 9952c, Mo. St. Ann. p. 7995, supra), are directory and not mandatory. This may be true as to the quoted provision of section 9952a, but to so hold would delete the provisions of section 9952b calling for a sale on the first Monday in November next thereafter and section 9952c requiring the county collector to commence the sale on the day mentioned in the notice, to wit, said first Monday in November. * * * * * The general rule and its limitations, likewise, recognized in the cited cases, are stated in 59 C.J. 1078, Section 634: 'A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer'."

In view of the above authority, we are of the opinion that such provisions requiring such Road Overseers to be appointed at the February term of court should be followed; however, it is not mandatory, but directory, and such appointment may be made at times other than during the month of February.

CONCLUSION

Therefore, we conclude that it is mandatory that Road Overseers be appointed under Section 8516. However, it is not imperative that such Road Overseers be appointed at the February

September 29, 1943

term of court. In so far as possible such appointments should be made at the February term of court, but since this requirement is merely directory and not mandatory, such appointments may be made at a later date.

Respectfully submitted,

AUBREY R. HAMNETT, JR.
Assistant Attorney General

ARH:ml

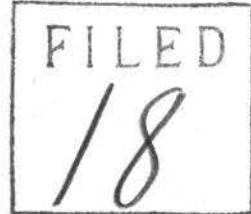
APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS: How cost of transporting Negro student to school is to be paid when it exceeds five dollars per month.

November 2, 1943.

Mr. Stephen Cornish,
Superintendent of Schools,
Pike County,
Bowling Green, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of September 22, 1943, as follows:

"The problem of educating a widely scattered Negro population is probably the most difficult one connected with my office. I should greatly appreciate it if you would clarify the law for me in certain particulars.

"What should be done about Negro children in districts so far from a school that \$5.00 per month is inadequate for transportation? Does your opinion of September 30, 1936, still hold?

"Our laws require us to give equal educational advantages to Negroes, and yet \$5.00 per month is sometimes a small fraction of what is necessary in transporting a single Negro child to school. What can we do in these cases?

"Has a school board met its legal obligations when it furnishes transportation to a Negro school, free tuition, but requires the pupil to walk three miles to the point where the transportation begins?"

Section 1, Article XI of the Constitution provides:

"The general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall estab-

lish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years."

Section 3, Article XI of the Constitution provides:

"Separate free public schools shall be established for the education of children of African descent."

These two sections make it mandatory that the state do two things. First, it must give free instruction to all children between the ages of six and twenty, and, second, where such children are negroes, the instruction must be given at separate schools.

From your request we assume that in the district in question there are less than eight negroes of school age. Where that is the case, Section 10350 R. S. No. 1939, after first providing that in the case of more than eight negro students a separate school may be established, or in lieu thereof they may be sent to the negro school in a district in the county wherein a school is maintained for them with tuition and transportation paid, then provides:

"* * * if the number of colored children enumerated is less than eight, they shall have the privilege and are entitled to attend school in the nearest district in the county wherein a school is maintained for colored children and the transportation and tuition charges incurred shall be paid; said transportation shall not exceed five dollars per month and tuition charges shall not exceed the pro rata cost of instruction.**"

It thus appears that while the constitution requires free instruction to these students, the legislative procedure set up for carrying out the constitutional mandate is somewhat restricted due to the limitation on the amount which the school district may contribute toward the transportation cost. However, we do not think this failure to provide sufficient funds

for payment of the total cost of transportation creates a violation of the constitutional provisions above cited.

Section 10350 has been the law for a good many years, but it was not until 1929 (Laws 1929, p.382) that there was introduced in the law a provision for transportation. Prior to the 1929 amendment the other provisions now incorporated into Section 10350 were contained in Sections 11145 and 11146 R. S. Mo. 1919. The statutes then provided where there were less than fifteen negro students in a district, they were to go to any district in the county wherein a school was maintained for them, and the sending district was to pay their tuition.

In other words the statutes then, as now, provide for the free education of negro students between the ages of six and twenty. That is what the constitution requires. It does not require that students be transported to and from school at public expense. Such requirements are solely of legislative origin, and that body has placed a limit on the amount to be expended for that purpose.

Where the sum of five dollars per month for each student is not sufficient, then, when the district pays that amount, it has discharged its legal obligation. From there on, under Section 10587 R. S. Mo. 1939, making education for children between seven and fourteen years of age compulsory, it becomes the parents' duty to see that the child gets to school. The inadequacy of the means for getting to school gives rise to no right of the student to demand transportation beyond what the law authorizes, since no one has the right to have the school he must attend located at any particular place. As was said in *Lehew v. Brummell*, 103 Mo. 546, 552:

"The distance which these children must go to reach a colored school is a matter of inconvenience to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of anyone, white or black. The inequality in distances to be traveled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint."

Just what arrangements the school district and the parents of these children may make to cover the cost of transportation above five dollars per student is something left to their own judgment.

As to our opinion of September 30, 1936, to Mr. Davis Benning, we still adhere to the view there expressed, that unless the school district does comply with Section 10350 up to the full extent required and permitted by said law, then "such school district shall be deprived of any part of the public school funds so long as the provisions of this section (Sec. 13350) are not complied with."

As to the point where transportation to school may begin, we wish to say that examination of the statutes fails to disclose a single provision which undertakes to say how far a student may be required to go from his home to the point where he may catch the school bus. That being so, then it appears such is a matter for the school authorities to determine in the exercise of their judgment in laying out the route of the school bus.

C O N C L U S I O N

It, therefore, is our opinion that where there are less than eight negro children in a school district, it is the duty of the district to send them to school in some district in the county where a school is maintained for negro children, and that said district must pay their tuition and provide at least the sum of five dollars per month per child for transporting said children to school; that where five dollars a month will not defray the cost of transporting the children to their school, then the parents of such children must assume the additional cost under such conditions as they may agree upon with the district; that failure of the district to pay the five dollars on transportation cost deprives said district of the right to any part of the public school fund; and, that in establishing a transportation route, there is no legal requirement as to how far a student may be required to go in order to reach the point to catch a school bus.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General.

LLB/LD

TAXATION: In case of death, resignation or removal
SUCCESSOR TRUSTEE: of trustee appointed under Jones-Munger
Act, successor trustee takes trusteeship
without any conveyance from original
trustee and takes title to all properties
acquired under authority of Section
11131, R. S. Mo. 1939.

February 2, 1943

2-11
FILED

19

Mr. Maurice W. Covert
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

This is in reply to your letter of January 26th,
1943, in which you request an opinion from this department
on the following question:

"In the sales of land for taxes the law provides, as you well know, that on the third sale the land may be bid in in trust for the various funds for which the taxes were levied. Section 11131 seems to be the only Section which controls the procedure of selling land in trust for the various funds and seems to contemplate that a person shall be appointed trustee for the purpose of taking the Title. The present Trustee in Texas County plans to resign and a new Trustee will be appointed. In the past few years this Trustee has taken the Title to the land at the sales in his name with the word 'Trustee' after his name. The law seems to be vague as to the exact procedure in a matter of this sort and I would like to have the benefit of your opinion as to whether or not the old Trustee should make a transfer to the County or

to the successor Trustee of all the land now in his name or whether, in your opinion, the Title would naturally pass to the new Trustee by virtue of his appointment without any record transfer of the Title. Another point I would like you to consider in answering this inquiry would be whether or not the old Trustee would retain Title and jurisdiction over the land now in his name and the new Trustee would become connected only with the land sold to him after his appointment."

The provisions of Section 11131, R. S. Mo. 1939, are applicable to your question, and the portion of said section pertinent to your question reads as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 11130 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent

taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the City of St. Louis. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees: * * * * *

It will be noted that no provision is made in this statute for the appointment of a successor trustee. Although the statute does provide that if the authority granted under the appointment is revoked that a certified copy of the revoking order shall be delivered to the collector. By implication this language would indicate that the county court was empowered to revoke the appointment of a trustee.

It will also be noted that the trustee appointed under this act has no authority to convey the lands purchased at tax sales without an order of the county court. By this we may infer that the trusteeship is really vested in the county court and that the person named is only a nominal trustee.

We find no cases in this state on the point which you have submitted, that is, in case of a change of trusteeship does the original trustee have such an estate in the trust property that he is required to execute a deed of conveyance to his successor. We think the rule announced in 65 C. J., page 636, Section 497, would be applicable under our statute, that is, "there is authority holding broadly that on appointment of a new trustee, title to the trust property vests in him by virtue of the appointment, and without necessity of a formal conveyance." Since our statute is somewhat indefinite on this question it is a question which should be settled by the Legislature. However, we think there may be enough implied from this statute as it is to support our conclusion.

CONCLUSION

From the foregoing it is the opinion of this department that the title to a trustee appointed by the county court under Section 11131, R. S. Mo. 1939, would pass to a new, or substitute trustee and without a conveyance from the original trustee.

We are further of the opinion that the successor trustee would take title to all trust property held by the original

Mr. Maurice W. Covert

-5-

2-2-43

trustee under authority of Section 11131, supra.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

DISTRICTS: Water districts formed under Article 12, Chapt. 79, R. S. 1939, do not have exclusive right to sell water in their territorial limits.

February 17, 1943



Mr. Perry M. Cortner
Attorney at Law
Suite 306 Commerce Bldg.,
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 12th in which you request an opinion of this Department. Your opinion request, omitting caption and signature, is as follows:

"I represent Water District #6 of Jackson County, Missouri, and we are confronted with a situation whereby Kansas City, Missouri, is now laying a pipe line through our District directly from one side to the other side of our District and it may be that in the future the City may desire to sell water to our customers or prospective customers in our territorial District also we now have one small competitor who buys directly from the City and sells from its line to people in our District.

"We are incorporated under Chapter 79, Article 12, of the Revised Statutes for Missouri of 1939. I find no decisions in the State of Missouri by our Appellate Courts whereby I can use them for an authority in advising my client whether or not we have exclusive rights to sell water in our District and that should any other Water Company whether it be Kansas City or a private individual desire to go into our District and supply water to our customers or prospective customers

or other people within our District, whether we would be within our rights to file an injunction suit to prohibit this.

"Therefore I would appreciate your opinion as to whether or not we have exclusive rights to sell water within our territorial limits.

"Your opinion would be greatly appreciated by the writer as well as Water District #6 of Jackson County."

As you state in your request, there have been no court decisions on Article 12 of Chapter 79, R. S. Mo. 1939, which deal with the formation of public water supply districts. In view of this fact it is necessary to examine the statutes in such article in an effort to arrive at the intention of the Legislature at the time it was enacted. We feel that this can be accomplished by a study of Section 12620, of the Laws of Missouri for 1941, page 353, which provides as follows:

"This article is intended to make possible, through public corporations, in counties which now have or may hereinafter have a population of twelve thousand five hundred inhabitants or more, conveniences in the use of water, ample in quantity for all needful purposes and pure and wholesome in quality, furnished from common sources of supply to many inhabitants of our state now denied such privileges; and thereby promote public health and sanitation, make available conveniences not otherwise possible, and for the general public welfare."

This section amends Section 12620, R. S. Mo. 1939, by merely changing the necessary population from twenty-five thousand inhabitants to twelve thousand five hundred inhabitants. This number, of course, is the minimum basis as set by the Legislature.

As can be seen from reading this section of the statutes, the purpose of the formation of such public water supply districts

Feb. 17, 1943

is for the promotion of public health and sanitation, to furnish conveniences not otherwise possible, and for the general public welfare. It is common knowledge that in many localities there is not an available water supply, and we feel that the intention of the Legislature in passing this Article 12, was for the benefit of the people living in such a locality and for their general welfare. If there is a possibility of a water supply from more than one source, of course this might possibly act to the benefit of the public also.

We have carefully studied and read the entire article, beginning at Section 12621 and ending with Section 12638, and also Section 12620 of the Laws of Missouri for 1941, and nowhere do we find in those provisions any intimation that such water district shall have exclusive right to sell water in the district included in its territorial limits.

Section 12624 sets out the powers of a public water supply district but does not say that it shall have the exclusive right to sell water in its district. These water supply districts may issue bonds and estimate the tax levy which is to be levied by the county court, but we do not feel that under any of the powers conferred upon these districts by the Revised Statutes that Water District No. 6 of Jackson County, Missouri, has the exclusive right to sell water in its territorial limits.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTERICK
Attorney-General

JSP:EG

OFFICERS: ELECTIONS: Present incumbents in townships
hold over for another term when
no election was held.

April 15, 1943

H-21
Honorable Maurice W. Covert
Prosecuting Attorney
Texas County
Houston, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of April 13, 1943, which reads as follows:

"Texas County has adopted the township organization law as provided in Chapter 101 of the Statutes and is now operating under township organization. One of the Townships in this County, Roubidoux, failed and neglected to hold a Township Election as is provided in Article 4 of the Chapter on township organization. Now the question has arisen as to the legality of the old board to continue in office for another term or if the offices are vacant the question as to who has the right to fill the vacancies. Ordinarily vacancies in all offices in the township except Justices of the Peace are to be filled by appointment by the Township Board, but in this instance there is a question in my mind as to whether the township has a legal township board. If not then the law seems to be silent as to whether or not the old officers hold over until the successors are elected and qualified or whether the County Court would have a right to appoint officers or whether the township could now, at this late date and irregular time, hold a township election. The way the

matter now stands all actions of the township board and of each and every township officer would be subject to attack on the grounds that the officer or officers performing such official acts were not legal officers. I would appreciate an opinion from your department on the above matter."

Article 1, Chapter 101 and Section 13944 of Article 4, of the Revised Statutes of Missouri, 1939, provides that the election of the township officers in counties under township organization should have been held on March 23, 1943.

Section 13945 R. S. Missouri, 1939, reads as follows:

"There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, and one township clerk, who shall be ex officio township assessor, one constable, two members of the board, and two justices of the peace: Provided, the same persons may be elected members of the board and justices of the peace, at the same election, and hold both offices; also the same person may be elected constable and collector at the same election and hold both offices at the same time, by taking the proper oath of each office and giving the bond required by law."

Under this section one trustee and two members of the board are chosen at the biennial election. They compose the board of directors as set out under Section 13976 R. S. Missouri, 1939.

Section 13960 R. S. Missouri, 1939, partially reads as follows:

" * * * * Township officers shall hold their offices for two years, and until their successors are chosen or appointed and qualified."

The above section complies with Section 5, Article XIV of the Constitution of Missouri, which reads as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

In construing Section 5, Article XIV of the Constitution, the Supreme Court of this State, in the case of *Langston v. Howell County*, 79 S. W. (2d) 99, pars. 3,4, said:

"Our Constitution (section 5, art. 14) provides that: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified,' and section 11196 R. S. 1929 (section 9168, R. S. 1919), Mo. St. Ann. Section 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' We find no constitutional or statutory provision which either expressly or by implication excludes the county highway engineer, or the office of county highway engineer, from the operation and effect of the foregoing constitutional and statutory rule so that since there is no 'contrary provision' the rule so prescribed must be applied. It is said in 46 C. J. p. 968: 'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appoint-

ed or chosen and has qualified.' Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached. His right to hold over and his continuance in the office was of course contingent and defeasible subject to be terminated at any time by the appointment and qualification of his successor. During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C. J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. It therefore appears that the trial court was in error as to the applicable rule of law, and in holding that Langston was not entitled to hold over and continue in office after the expiration of the term prescribed by the order of appointment."

We find no statutory provision which would prevent the board of directors of a township from holding over. In view of the holding in the case of Langston v. Howell County, supra, it is the settled law in this State that where there is no contrary provision as to the term of office or number of terms of office, the officeholder holds office during his official term and until his successor shall be duly elected, or appointed, and qualified.

Also, in the case of State v. Brown, 274 S. W. 965, par. 1, the court said:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite

period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel Lusk, 18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 78."

Under the above holding the same law applies in the case of an election or an appointment.

Since Section 13944 R. S. Missouri, 1939, sets the time of the election, and there is no provision for a special election at any other time, the election can only be held at the time specified. That an election must be held on the date set out by statute was held in the cases of State ex rel Baker v. Fiala, 47 Mo. 310; State ex rel McHenry v. Jenkins, 43 Mo. 26; State ex inf. v. Lund, 167 Mo. 228, 1. c. 234; State ex inf. Smelt, 152 Mo. 512, 1. c. 517; and State ex inf. Attorney General v. Dobbs, 182 Mo. 359.

CONCLUSION

It is, therefore, the opinion of this department that even though one of the townships in Texas County, which is under township organization, neglected to hold an election for the election of the township board, the present incumbents hold over for another term until the next election of township officers.

It is further the opinion of this department that even though no election had been held that there is no vacancy to be filled, either by the county court or by any board of directors of other officers who are appointed by the township board.

Respectfully submitted

APPROVED BY:

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TOWNSHIPS: Fair Labor Standards Act does not apply to employees of township or other political sub-divisions of the State.

May 8, 1943.



Hon. Maurice W. Covert
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

The Attorney-General wishes to acknowledge receipt of your letter of May 6th, in which you request an opinion of this Department. This request, omitting caption and signature, is as follows:

"A request has been made of me by a member of a Township Board as to whether or not townships are required to comply with the provisions of the National Wage and Hour Law in relation to their employees on road work and other township work. Will you kindly give me an opinion on this question?"

The National Wage and Hour Law, which you mentioned in your request, is under the Federal Statutes, known and denominated as the "Fair Labor Standards Act," and is to be found under Title 29 of the U.S.C.A., under the heading "Labor." This act is Chapter 8 of such heading and comprises Sections 201 to 219 of the labor statutes. These regulations are set out between pages 439 and 558 of Title 29. Section 203 of Title 29, on page 447, is entitled "Definitions" and defines the word "employer" as used in the "Fair Labor Standards Act." This definition is as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or

May 8, 1943

any state or political sub-division of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

It will be seen from Section 206, of Title 29, that this refers to "every employer" and his duties as to minimum wages of employees. The same condition will be found in Section 207, which also refers to "employer." Therefore, it is apparent that if an employer happens to be a political sub-division of the State of Missouri, that the Fair Labor Standards Act does not apply under the definition set out in Section 203 of Title 29, quoted above. This conclusion consequently brings us to the question of whether or not townships in the State of Missouri are political sub-divisions of the State.

The last case dealing directly in point on this matter, which we have been able to find in our research, is the case of Wright County ex rel. Elk Creek Township v. The Farmers and Merchants Bank, 30 S. W. (2d) 32. The Court in this case made the following statement:

"Moreover, an organized township, in a county under township organization, is a political sub-division of the state under Section 12, Article VI of the Constitution."
(Citing Drainage District v. Trail Creek Township, 317 Mo. 933, 1. c. 941, 297 S. W. 2d 1.)

Section 12 of Article VI of the Constitution of Missouri, spoken of in the above quotation, is the constitutional provision referring to the jurisdiction of the Supreme Court of this State, and in the last sentence therein we find the following quotation:

"* * * in cases where a county or other political sub-division of the State or any State officer is a party, and in all cases of felony."

In other words, the Court in this case held that a township is a political sub-division of the State and as such all cases involving such township may be brought to the Supreme Court either by an appeal or writ of error.

May 8, 1943.

Conclusion

Therefore, in view of the above, it is the opinion of this Department that townships in the State of Missouri are not required to comply with the provisions of the National Wage and Hour Law, otherwise known as the Fair Labor Standards Act, in relation to their employees on road work and other township work.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

COUNTY
COLLECTOR:

All statutory requirements in sale for delinquent taxes must be complied with exactly as prescribed. A sale held in any other manner renders the transaction void.

July 6, 1943



Honorable Phil H. Cook
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Cook:

This office is in receipt of your letter together with a request from Mr. Leo A. Wollenman, County Collector of Lafayette County. The full text of Mr. Wollenman's letter is as follows:

"This office desires information concerning the status of certain tracts, lots or parcels of land that are now carried on our delinquent land tax book.

"The law provides that the Collector is required to advertise and offer for sale these delinquent properties, and we are not sure as to the status of some of these properties.

"In November 1939 and 1940 some of these properties were offered for sale by former Collector Sam Smith, and at the third sale the properties were bid in by Wm. H. Cohrs as Trustee for Lafayette County.

"For two years, 1941 and 1942, the record of these properties was maintained separate from the other delinquent properties, and kept in the back of the land book. The properties were sold for the taxes due for the year 1930 and later. Mr. Cohrs would not accept the trusteeship of these properties, claiming that the sales were not legally conducted,

and that Lafayette County has no legal authority to hold or dispose of these properties. No deeds to these properties were made by the Collector or accepted by the Trustee.

"Due to the fact that this office will soon be required to advertise and offer for sale delinquent properties now on the delinquent book. In view of the above, can we again advertise the properties heretofore advertised and sold to Mr. Chors as Trustee, or, are these properties now out-lawed."

An examination of the procedure under delinquent and back tax matters in the State of Missouri reveals the fact that the following statutes apply to the problem as outlined by your collector: Sections 11126, 11127, 11129, 11130, and 11131 R. S. Mo., 1939. We will proceed to take these sections up in detail together with decisions as they apply thereto. You will note that these sections are not quoted because of their very great length and for the further reason that you are already familiar with the details of same.

At Section 11126 we find the provision that the collector shall publish a list of delinquent lands before the sale of any lands without judicial proceedings to enforce a lien of the state for taxes. In its express terms this statute provides in detail how property shall be offered for sale. It gives express directions as to the mode and manner of the sale and leaves no doubt as to the matters pertaining to publication prior to the sale.

We direct your attention to the decision of Schlafly v. Baumann, 341 Mo. 755, 108 S. W. 2d 363, 366:

" * * * * * Statutory provisions prescribing the time and place of tax sales have been strictly

construed in favor of the taxpayer and strict compliance therewith rigorously exacted. The maxim, 'Expressio unius est exclusio alterius,' is especially apropos. Keane v. Strodman, 323 Mo. 161, 167 (II), 18 S. W. (2d) 896, 898.
* * * * *

The court in Rubey v. Huntsman, 32 Mo. 501, 504, said:

" * * * * * The 9th sec. of the 15th art. of the act concerning Revenue (R. C. 1845, p. 949,) provides that the sale shall be made 'before the courthouse door of the county.' It is well established in this State that a person claiming to hold land under a sale for taxes can only maintain his title when the law has been strictly pursued. It is immaterial whether it was more convenient to all persons, or better in any respect to sell within than before the courthouse; the law has prescribed the place of sale, and that is the only proper place; it is so because the law has said so, and there can be no reasoning about it. (Reed v. Morton, 9 Mo. 868; Donohoe v. Veal, 19 Mo. 331; State, ex rel. Donohoe, v. Richardson, 21 Mo. 420.)"

This view is also held by the court in McNair v. Jenson, 33 Mo. 312, and the case of Rubey v. Huntsman, supra, is cited as authority. Further, in the case of Keene v. Barnes, 29 Mo. 377, 378, the court held the following:

"A county collector making sale of land for taxes under the act of February 13, 1847, (Sess. Acts, 1847, p. 119, sec. 10,) was bound to make his sales before the door of the court-house of the county; so also he was required to set up at the court-house

door a copy of the advertisement by the register of lands of all the unredeemed lands of the state for sale, also to set up at the most public places in the county the twenty slips received from the register setting forth the lands and lots advertised in each county. If these requirements were not complied with, the sale by the collector would be invalid."

In *Beckwith v. Curd*, 347 Mo. 602, 148 S. W. 2d 800, 803, the Court said:

"We think the rule is well established that when an administrative officer sells property at a tax sale, a strict compliance with the statutes is required. The omission of the 1931 and 1932 taxes from the notice of sale voided the sale by the city to the respondents because the notice did not include all the delinquent taxes as required by Section 6208, *supra*."

And in *State ex rel. Hayes v. Snyder*, 41 S. W. 216, 139 Mo. 549, the Court said:

"The State has two methods by statute for collecting taxes against real estate. One is by suit to enforce the State's special lien against the specific piece of property; by the other, the collector is given power to seize and sell personal property, without judgment, for the payment of all taxes."

At Section 11127 the period of sale and manner of bids is outlined in detail, and the decisions as they apply to this particular section may be found as follows: *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528; *Reeds v. Morton*, 9 Mo.

878; *Comfort v. Ballingal*, 134 Mo. 281, 35 S. W. 609, 612, in which the Court said:

"When the process of collecting taxes by the sale of lands for their nonpayment is a summary remedy, as in the case at bar, and the law requires that certain things be done by the officer making such a sale, in connection therewith, nothing less than a strict compliance with such requirements will suffice; and, unless it appear that the law has been strictly complied with, the sale will be void. * * * * *

And *Kries v. Holladay-Klotz Land and Lumber Co.*, 121 Mo. App. 184, 98 S. W. 1086, 1088, which cites *Reeds v. Morton*, supra, and in which the Court stated the following:

" * * * * * We quote from Judge Cooley's work:
'At the common law it was necessary that one who claimed to have obtained title to property of another under proceedings based upon a neglect of public duty should take upon himself the burden of showing that the duty existed and had not been performed, and that in the consequent proceedings the law had been complied with by those who had them in charge. Especially if the proceedings would operate with severity, and be in their effects something in the nature of a forfeiture, the law was strict in its requirement that his evidence should exhibit the proceedings from step to step, and show that each of the safeguards with which the statute had surrounded the delinquent for his protection in this very emergency had been duly observed. And this tenderness for his interests appeared but reasonable. Of what service could it be that safeguards were provided, if observance was not essential—if a careless or incompetent officer might overlook or

disregard them with impunity, and deal with the property of the citizen as if his position as an officer of the government vested him with a dispensing authority over legislation, and authorized him to make, in his discretion, a law for the case as he proceeded. This rule of the common law has not been modified by decisions, and is still recognized and enforced where statutes have not changed it. It may consequently be said to be the general rule that the party claiming lands under a sale for taxes must show affirmatively that the law under which the sale was made has been substantially complied with, not only in the sale itself, but in all the anterior proceedings.'

"The doctrine thus expressed has been declared in substance by the Supreme Court of this state from its earliest decisions in construing every enactment which has been on our statute books regarding the sale of land for taxes. *Morton v. Reeds*, 6 Mo. 64; *Reeds v. Morton*, 9 Mo. 878; *Yankee v. Thompson*, 51 Mo. 234. But the reason for the acceptance of the doctrine defines its limits. It exists for the protection of the owners of property whose interests are sacrificed by judicial sales for their omissions of public duty. It is for them the law requires various acts to be done before their property can be sold; and if some official fails to perform one of the essential acts, the legal rights of the citizen having been ignored to that extent, his property cannot be taken from him. Hence we think the rule applies only in cases where the contest is between the purchaser at the tax sale, or some one claiming under him, and the original owner or person claiming under the latter, or, at most, in controversies between the holder of the tax title and some one asserting another title. It ought not to be applied in a case between the owner under a sale for taxes and an intruder who injures the

July 6, 1943

inheritance without any claim of title or pretense of right to enter on the premises. * * * "

Coming now to Section 11129, which concerns itself with the re-offering of delinquent lands and lots where they have not been sold under the first sale, we find it unnecessary to do more than cite this section. Also Section 11130 contains the provisions of the third sale, and Section 11131 contains the provision that the county may bid in delinquent lands to protect themselves.

CONCLUSION

From the statutes cited and the decisions which we have offered for your information we conclude that all of the prerequisites must be shown to have existed to enable the collector to hold the sale. The sale must be held exactly as prescribed by statute; and if conducted in any other manner, the conveyance is void. We are further of the opinion that, since in the present instance no conveyance was ever made nor an acceptance given by the trustee, there has not been a compliance with the statutes in the sale of this property. Since we conclude that no sale was ever held in the present instance, we further find that no statute of limitations could run in the present instance.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

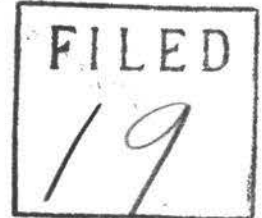
LIM:FS

COUNTY FARM BUREAUS: County Court must make appropriation to
county farm organization, and extension
EXTENSION AGENT : agents must maintain office at county seat.

December 10, 1943.

Hon. Phil H. Cook,
Prosecuting Attorney
Lafayette County,
Lexington, Missouri.

12-14



Dear Sir:

This will acknowledge receipt of your letter
of October 30, 1943, as follows:

"The County Court has requested me to ask
for an opinion from your office on the follow-
ing: The County Farm Organization, The County
Agricultural Agent, and The Home Demonstration
Agent of Lafayette County, maintain their of-
fices and headquarters in Higginsville, Mis-
souri, which is not the county seat. Assuming
that the County Agricultural Agent and The
County Home Demonstration Agent fails or refus-
es to move their offices and headquarters to
the county seat, as provided in House Bill No.
112 of the Sixty-Second General Assembly, would
the County Court have authority to appropriate
and pay the funds provided in House Bill No. 112
to the County Farm Organization."

The provisions of House Bill 112 appear in Laws,
1943, page 319 et seq. Section 5 of said Act is as follows:

"The board of directors of the county farm
organization, in cooperation with the county
court and the University of Missouri College of
Agriculture, shall prepare an annual financial
budget covering the county's share of the cost
of carrying on cooperative extension work in
agriculture and home economics provided for in
this act, which shall be filed with the county
court in class 4 of the budget of county expen-
ditures for such year in counties budgeting the
county expenditures by classes and in all other
counties in the budget document, subject to the
following restrictions:

"In counties with a total assessed valuation of \$7,500,000.00 or less, the minimum appropriation shall be \$1,000.00. In counties with a total assessed valuation of \$12,000,000.00 or less, but more than \$7,500,000.00, the minimum appropriation shall be \$1,600.00. In counties with a total assessed valuation of \$25,000,000.00, or less but more than \$12,000,000.00, the minimum appropriation shall be \$2,000.00. In counties with a total assessed valuation of more than \$25,000,000.00, the minimum appropriation shall be \$2,500.00.

"Provided, that no county shall appropriate more than twenty-five (25) cents per capita of the rural population as determined by the last federal census:

"Provided further, that in any year in which the county farm organization approves a budget of lesser amount than is herein provided, then the lesser amount so approved shall be appropriated by the County Court."

Section 6 of the Act contains the following provision:

"The office or headquarters of any county agriculture agent, county home demonstration agent or county boys' and girls' club agent, as provided for in this act, shall be maintained at the county seat of each county."

The question presented is whether each of the above provisions is mandatory and independent of the other, that is, must county courts make the appropriation specified in Section 5 irrespective of whether the agents named in Section 6, supra, maintain their office and headquarters at the county seat, and must said agents maintain their office and headquarters at the county seat irrespective of whether the county court makes the appropriation specified in Section 5.

Dealing first with the appropriation, we note that Section 5 provides that the budget covering the county's share of the cost of carrying on cooperative extension work in agriculture and home economics "shall be included by said county court" in the budget of county expenditures. Ordinarily

"the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute." State ex rel. Stevens v. Wurdeman, 246 S.W. 189, 194 (Mo. Sup.). Another applicable rule is that a statute will be construed as mandatory, "where public interests are concerned and the public or third persons has a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good". Kansas City, Mo. v. J. I. Case Threshing Mach. Co., 87 S.W.(2d) 195, 205 (Mo. Sup.). Here, Section 5, uses the mandatory word "shall" in directing that something be done, and the thing to be done is something in which a third person (the county farm organization) and the public generally have a claim de jure, and it (the appropriation) is for the public good. We have no doubt that the terms of Section 5, in requiring the appropriation to be made, are mandatory and must be obeyed by the county court.

Next we note that Section 6, in dealing the office situs of the agents named therein, states that said office or headquarters "shall be maintained at the county seat in each county." Under the Wurdeman case, supra, this is an indication that such requirement is mandatory.

Further it appears that the county agriculture agent, county home demonstration agent and county boys' and girls' club agents are employees of the University of Missouri. The nature of this branch of the University's activities is stated in the 1941-1942 Official Manual of Missouri, page 606, as follows:

"The Agricultural Extension Service was established by the Board of Curators of the University, June 8, 1914. Approximately one-half of its support comes from federal funds allotted to the state under the terms of the Smith-Lever Act of Congress, approved May 8, 1914, and later supplementary Acts of Congress. The balance of the financial support accruing to this service is derived from state and county appropriations, supplemented by funds contributed by various organizations, principally the county farm bureaus of the state.

"The Agricultural Extension Service is a teaching branch of the University. It is organized and administered for the specific purpose of giving information in subjects relating to agriculture and home economics to persons who are not resident at the University. It teaches both adults and young people -

the latter through the agency of the Boys' and Girls' 4-H clubs.

"Instruction is given mainly by the use of demonstrations established on farms and in farm homes. Local organizations and local leadership are utilized to the fullest extent possible, to the end that people may be taught in groups corresponding to the way classes are taught on the campus. Large use is made of printed circulars.

"All lines of instruction are organized on a project basis. Extension instruction is based mainly on county and community programs of work. These programs, in turn, are based on the conscious needs of counties and communities for instruction in agriculture and home economics of immediate local significance."

This activity of the University is supported out of the public treasury of Missouri (Laws, 1943, p. 198 Sec. 1) and by contributions from the Federal government under the Smith-Lever Act, 7 U.S.C.A. 341-348, which federal act in Section 341 provides that said contribution is to be expended by the colleges "as the legislature of such state may direct." In other words, these agents are employees of the State of Missouri and as such are subject to rules governing their place of employment as the State, through the General Assembly, may direct. The State has the unquestioned right to prescribe where one of its employees shall maintain his office, and when it does so in the mandatory language, here used, such direction must be obeyed. Clearly the requirement of Section 6, as to the location of the office of these agents, is mandatory.

It therefore appears that each provision under examination is mandatory. We see nothing in said Act (Laws, 1941, p. 319, Secs. 1-10) which in any way indicates that these provisions are dependent one upon the other, and that if one requirement is not obeyed then the other may be ignored. Examination of the Act conclusively demonstrates that this cannot be so. It directs the county court to appropriate a certain sum toward the expense of an organization called the "county farm organization" an incorporated body. Why should that body be caused to suffer because these county agents neglect or refuse to do as the law directs? The agents are not the county farm organization, and on the other hand why should these agents be held to have authority to ignore the law because the county court fails or refuses to do as the

law directs? The appropriation required to be made does not go to these agents, but rather to the county farm organization. While it may be used to pay these agents, that does not alter the situation.

CONCLUSION.

It, therefore, is our opinion that both the provisions under discussion are mandatory, and the county court must make the required appropriation, without regard to whether the agents maintain their office at the county seat, and the agents must maintain their office at the county seat without regard to whether the county court makes the required appropriation. Failure on the part of either to comply with these provisions may be corrected by writ of mandamus.

Respectfully submitted,

LAWRENCE L. BRADLEY,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK,
Attorney-General.

LLB/LD

ACCOUNTANTS: State Board of Accountancy -

Candidate for
C.P.A. examination
need not be in pub-
lic practice.

May 25, 1943

Mr. Eugene D. Cronk
Secretary
State Board of Accountancy
809 Ambassador Building
St. Louis, Missouri



Dear Sir:

This will acknowledge receipt of your letter of
May 22, 1943, in which you request an opinion as follows:

"The State Board of Accountancy, at
their meeting held May 17, 1943, au-
thorized me to request you to give us
your opinion as to whether or not it
is necessary for a candidate for the
C. P. A. examination to be in public
practice in order to sit for said ex-
amination."

Section 14906 R. S. Missouri, 1939, partially reads
as follows:

"The governor shall, within thirty
days after the taking effect of this
chapter, appoint five persons, who
shall constitute the board of ac-
countancy, each member of which shall
have been engaged in the reputable
practice as a public accountant for a
continuance period of three years im-
mediately preceding the passage of
this chapter, one of which shall have
been in the state of Missouri. * * *"

It is very noticeable under the above partial section that it is mandatory that each of the five persons appointed by the Governor as members of the Board of Accountancy shall have been engaged in the reputable practice as a public accountant for a continuous period of three years immediately preceding passage of this chapter, one of which shall have been in the State of Missouri. This chapter, 115, of the Revised Statutes of Missouri, 1939, appeared in the Revised Statutes of Missouri, 1929. Upon the expiration of the board members' terms the new members to be appointed shall hold certificates as certified public accountants, as set out in this section. At the time of the enactment of the chapter it goes without saying that certified public accountants were not created and the Legislature saw fit to refer to the first members as "public accountants."

"Public accountants" are public only in the sense that their services are offered to anyone who chooses to employ them. (*Ultramares Corp. v. Touche*, 174 N. E. 441, 255 N. Y. 170.)

Section 14907, par. (b), R. S. Missouri, 1939, reads as follows:

"Applicants for certificates, before taking the examination, must produce evidence satisfactory to the board that they are over twenty-five years of age, of good moral character, a graduate of a high school with a four years' course, or have an equivalent education, or pass an examination to be set by the board and that they have had at least three years' practical accounting experience."

It is very noticeable that the Legislature saw fit to require as qualifications of a person who desired to take the examination to become a certified public accountant that he have at least three years' practical accounting experience. It did not see fit to say, three years practical accounting experience immediately preceding the time of the taking of the examination, or, that he should be

May 25, 1943

in public practice at the time he applied to take the examination. In construing this partial section the primary rule of construction of statutes is to ascertain and give effect to lawmakers' intent, which should be done from words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. (City of St. Louis v. Pope, 126 S. W. (2d) 1201, 344 Mo. 479.)

If it was the intention of the Legislature that the person applying for examination to become a certified public accountant should be in public practice at the time it would have set out in paragraph (b) of Section 14907, supra, the words, "who is in public practice at the time that he applied for said examination, and not, "that they have had at least three years' practical accounting experience", as it appears in said paragraph.

It is very noticeable that Section 14907, paragraph (b), supra, does not state the words "public accountant" as set out in Section 14906, supra, but states, "practical accounting experience."

A very similar situation arose in the District of Columbia, which case is reported in 10 Fed. Cases 1032. The facts under that case were that the charter of the Mechanics' Bank, located in the District of Columbia, provided that eight of the directors should be practical mechanics. The Federal Court held that it was not necessary, in order to render directors eligible, that they should be in actual practice as practical mechanics at the time of their election, it being sufficient that they were practical mechanics and had been in actual practice. (Gray v. Mechanics' Bank, 10 F. Cases 1032.)

Also, in this State, in a damage suit against a railroad, an instruction was attacked where they used the words, "practical railroad operatives." The Supreme Court, in defining such a term said that a practical railroad operative must be one of experience in that line. (Loftus v. Metropolitan Street Railway Company, 119 S. W. 942, 220 Mo. 470.)

Since the Supreme Court defined "practical railroad operatives" as above set out, then their definition could be used in defining the words, "practical accounting experience"

Mr. Eugene D. Cronk

(4)

May 25, 1943

as set out in Section 14907, paragraph (b), supra. In other words, all that is required of a candidate to take an examination to be a certified public accountant would be that he had had at least three years' practical accounting experience and it would not be necessary that he be in public practice at the time he applied for the examination.

Effect must be given, if possible, to every word, clause, paragraph and section of a statute and a statute should be so construed that effect may be given to all of its provisions, and so that no paragraph or section will be inoperative, superfluous, contradictory, or conflicting, and so that one section or paragraph will not destroy another. (Graves v. Little Tarkio Drainage District No. 1, 134 S.W. (2d) 70, 345 Mo. 557.)

CONCLUSION

It is, therefore, the opinion of this department that it is not necessary for a candidate for the certificate of certified public accountant to be in public practice at the time he takes the examination.

It is further the opinion of this department that in construing paragraph (b) of Section 14907 R. S. Mo., 1939, in reference to the term, "that the applicant should have had at least three years' practical accounting experience", it is only necessary that he have that experience at any time previous to the time that he becomes a candidate for the examination.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

INSANE PERSONS: State has no claim on estate of insane
person sent to the institution by county
COUNTIES: court as a poor person.

June 28, 1943

Mr. Lieu Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

7/1
FILED

20

Dear Sir:

We are in receipt of your letter of June 25, 1943, in which you request an opinion from this department, as follows:

"In re: Estate of Anna La Pette Howe, deceased, Probate Court of Camden County, Missouri.

"The above estate is solvent, having some life insurance and money, as well as real estate, there are no near relatives.

"Anna La Pette Howe, was sent to the State Hospital at Fulton, Missouri, in 1934 or 1935, and remained there until her death in July, 1942.

"I have prepared and had filed a demand for the County for their expenditures in her behalf, and the Administrator is willing to pay the demand, providing the State does not file a demand for their expenditures, the Administrator has requested that I obtain your opinion as to the right of the State to file a demand for their proportion of the cost of keeping her in the Hospital, and if the State can or desires to file a demand to have it filed immediately.

"I have been unable to find any law relative to the matter, however would appreciate your opinion upon the matter on or before the 30th of this month, at which time the Administrator has agreed to pay the County their demand.

"The Administrator of course does not wish to pay the county demand and not have sufficient funds to pay the State."

There are two procedures for admission of a patient who is insane to the state hospital. The first procedure is that of a pay patient who has sufficient money to pay his expenses while confined in the hospital. The second procedure is that of an indigent poor person who has no money to pay his expenses while confined in the hospital.

Section 9322, R. S. Mo. 1939, provides that pay patients, or those not sent to the hospital by order of the county court, may be admitted on such terms as Article 2, Chapter 51 Revised Statutes 1939 may provide.

Section 9323, R. S. Mo. 1939, provides that the superintendent of the state hospital shall be furnished with a request for the admission of a patient into the hospital in the form set out under Section 9324, R. S. Mo. 1939.

Section 9325, R. S. Mo. 1939, sets out the form of the certificate of two physicians, as is set out in Section 9323, which section sets out specifically the information that shall be furnished to the superintendent of the state hospital.

Section 9326, R. S. Mo. 1939, sets out the form of bond that is to be signed by two sureties as required under the information requested by the superintendent under Section 9323.

Where a patient is sent to the state hospital as a pay patient ~~the state hospital as a pay patient~~ the state does not look to the county for the payment of the costs of the upkeep of the patient, but looks to the bondsmen who signed the bond, as set out in Section 9326, R. S. Mo. 1939.

It is true that the probate court has concurrent jurisdiction with the county court to hold a sanity inquisition of poor persons, but that such court has no authority to commit an insane poor person to a state hospital is held in the case of Van Loo v. Osage County, 141 S. W. (2d) 805, Par. 2,3, where the court said:

"It is our conclusion and we so rule that the probate court has concurrent jurisdiction with the county court to hold sanity inquisitions of poor persons, but that such court has no authority to commit an insane poor person to a state hospital. And we further rule that when a poor person is adjudged by the probate court to be insane and also found by said court to be disordered in mind, etc., as set out in Sec. 498, supra, then the probate court has the authority to make an order that such person be held until the county court shall cause him or her, as the case may be, to be 'removed to a state hospital' as provided in Sec. 8657, R. S. 1929, Mo. St. Ann. Sec. 8657, p. 7750, for the circuit court, and to transmit to the county court a certified copy of its proceedings in the matter. And in such situation there would be, as in the circuit court procedure, no occasion for any adjudication of sanity in the county court. The procedure in the Cox case, supra, was such or similar."

In the above quotation the probate court, it is said, may hold a sanity hearing for the purpose of declaring a poor person insane, but the usual procedure for the confinement of poor persons is set out in Section 9328, R. S. Mo. 1939. In that section the county is compelled to pay semi-annually, in cash in advance, such sums for the support and maintenance of the insane patient as the board of managers of the hospital may deem necessary, not exceeding \$6.00 per month for each patient. The county is also liable for the actual cost of their clothing and expenses of removal to and from the hospital, and if they die in the hospital for the burial expenses.

Section 9335, R. S. Mo. 1939, describes the proceedings for the admission of county patients.

Section 9336, R. S. Mo. 1939, provides for the notification of the insane person before he is declared insane by the county court.

In your request you infer that the State may file a demand for their expenditures upon the estate of Anna La Pette Howe. As said before, if the patient had been sent to the state hospital as a pay patient the State could only look to the bondsmen on the bond. But if the patient was sent to the state hospital as a poor person by the county, the State could only look to the county for the payment of any money due it and not to any estate left by the patient. There is a possibility, which your request does not disclose, that there may have been a change of status of the patient while in the hospital. Section 9346, R. S. Mo. 1939, provides the procedure by which a pay patient may be made a county patient, and Section 9347, R. S. Mo. 1939, sets out the procedure by which a county patient may be made a pay patient.

In writing this opinion we are assuming that during the time of the confinement of the patient in the state hospital she was there on an order of the county court as a poor person, and, we are also assuming that the demand made by the county upon the administrator of the estate is for money expended by the county to the State.

CONCLUSION

It is, therefore, the opinion of this department that if Anna La Pette Howe at the time of her entire confinement in the state hospital was there as a county poor patient, by order of the county court, the State would not have any claim against her estate for the reason that the state can only look to the county for the payment of the expenses of her confinement, maintenance and support.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

WJB:CP

CONFEDERATE HOME: Present Board of Trustees continues in charge until effective date of Senate Bill No. 178; there being no appropriation to cover per diem of board members, none can be paid but they may draw mileage for attending meetings.

August 5, 1943

Mr. John C. Croswhite, Superintendent
Confederate Home of Missouri
Higginsville, Missouri



Dear Sir:

This will acknowledge receipt of your letter of July 25th as follows:

"Senate Bill no. 178, passed at the recent session of legislature, and signed July 22 by the Governor, provides in section 1, for abolishing the Board of Trustees of the Confederate Home, and transferring control and management to the Board of Managers of the Eleemosynary institutions. It also provides that the Board of Managers of the Eleemosynary Institutions shall maintain the Confederate Home and Memorial Park at Higginsville for the purpose for which it was established, so long as it shall be needed for the maintenance and care of infirm and dependent ex-Confederate veterans and their widows.

"It further provides that the Board of Managers of the State Eleemosynary Institutions shall have full power to transfer, in its discretion, to the said Home any aged infirm person who now is, or hereafter may be, properly within its jurisdiction as an inmate of any state hospital provided that the said transfer shall not interfere with the purpose for which the Home was established.

"However, House Bill no. 659, designed to finance the transfer of patients from state hospitals, and to provide

for their maintenance here, failed to emerge from the Senate Appropriation Committee.

"This leaves only an appropriation for the Confederate Home as provided in House Bill no. 419, section 33, page 19. Item A. of this bill sets aside under the heading 'Personal Service', the sum of \$15,000.00 for the 'salaries of the caretaker and assistants.' Section 79 of this same bill declares that an emergency exists within the meaning of the Constitution and that the Appropriation bill no. 419, is now effective and in full force, immediately upon final passage.

"Two questions develop from conflicting provisions of Bills no. 178 and 419. They are:

"(1) Which Board has supervision of this appropriation for the 90 day period, before which time Senate Bill no. 178 becomes effective?

"(2) No provision being made in House Bill no. 419, for salaries and per diem and mileage for the Confederate Home Board, since none were contemplated at the time of its passage, can the Confederate Home Board continue to draw from this appropriation for the 90 day period of its existence?

"It is urgent that I know your ruling soon, so that I may make necessary reductions in personnel, in order to stretch the small appropriation as far as possible. Therefore, I shall greatly appreciate your prompt attention."

Directing our attention to your first question, we need to only point out that Senate Bill No. 178 of the 62nd General Assembly does not become effective until ninety days after the passage and approval thereof by the Governor. This bill was approved by the Governor on July 22, 1943, and

August 5, 1943.

until a 90 day period elapses from the date of approval, the Board of Trustees of the Confederate Home is still in existence and has complete charge and control over the Confederate Home at Higginville.

As to your second question, it appears that House Bill No. 419 of the 62nd General Assembly, in Section 33, provides: "A. PERSONAL SERVICE: For salaries of caretaker and assistants \$15,000.00". Compare that with the provisions of Senate Committee Substitute for House Bill No. 50 covering the appropriation to the Confederate Home for the period beginning January 1, 1943 and ending June 30, 1943. It is provided in Section 34 as follows: "A. PERSONAL SERVICE: For salaries of board members and treasurer of board * * * . . . \$8,100.00". Also, it is to be noted that the appropriation for the 1941-1942 biennium, Laws of 1941, page 195, Section 34, provides: "A. PERSONAL SERVICE: For salaries of board members and treasurer of board * * * . . . \$45,000.00".

Thus, comparison of House Bill No. 419, supra, with the previous acts set forth, clearly demonstrates that the salaries and per diem for the members of the Board of Trustees has been eliminated from the appropriation act and that as House Bill No. 419 stands, no money has been provided to pay the salaries and per diem of those officers. That being so, then the funds provided in Section 33 of House Bill No. 419 cannot be used to pay the salaries and per diem of the members of the Board of Trustees under provisions of Article 10, Section 19 of the Constitution of Missouri, which requires every appropriation law to "distinctly specify the amount appropriated and the object to which it is to be applied."

In view of the fact that there have been no funds appropriated with which to pay the salaries and per diem of the Board of Trustees, the members of the Board of Trustees may not continue to draw upon the present existing appropriation during the ninety day period after July 22, 1943, but they remain in existence as a Board and in charge of the Confederate Home.

However, the same rule would not seem to apply to traveling expenses incurred by the Trustees in connection with attending board meetings, et cetera. It appears from examination of Section 34, Laws of 1941, page 195, and

Mr. John C. Croswhite

-4-

August 5, 1943.

Section 34 of Senate Committee Substitute for House Bill No. 50 of the 62nd General Assembly that such items of transportation expense for the members of the Board have always been provided for under the item of "OPERATIONS". The operation appropriation, in Section 33 of House Bill No. 419 of the 62nd General Assembly, still provides for travel expense, and we think it is available to cover any items of expense that may be incurred by the members of the Board of Trustees during the ninety day period following July 22, 1943.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:jn

TAXATION: Lands acquired by drainage districts
DELINQUENT TAXES: are not subject to taxation and the
DRAINAGE DISTRICTS: lien for delinquent taxes may not be
enforced during the ownership of the
lands by a drainage district.

January 19, 1943

Mr. George O. Dalton
Collector of Marion County
Hannibal, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you submit the following question:

"After a Drainage District has acquired
title to property are they liable for
back taxes that have accumulated against
the real estate?"

Since you do not state in your letter under which
Article the district is formed we cannot definitely answer
questions 2 and 3 submitted by you. However, we will refer
you to the opinion written to you by this department under
date of January 13th, 1940.

On the question of the liability of the district
for taxes on lands which taxes accrued before the district
acquired title to the lands, we refer you to Section 6,
Article X of the Constitution of Missouri, which is as
follows:

"The property, real and personal, of the
State, counties and other municipal corp-
orations, and cemeteries, shall be exempt
from taxation. Lots in incorporated
cities or towns, or within one mile of
the limits of any such city or town, to
the extent of one acre, and lots one mile
or more distant from such cities or towns,
to the extent of five acres, with the
buildings thereon, may be exempted from
taxation, when the same are used exclu-
sively for religious worship, for schools, or
for purposes purely charitable, also

such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Also, Section 7 of Article X of the Constitution of Missouri, as follows:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

We also refer you to Section 10937, R. S. Mo. 1939, which provides in part as follows:

"The following subjects are exempt from taxation: * * * * * fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; * * * *

Drainage districts are municipal corporations.

In State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, 78, the court, in arriving at the foregoing statement, said:

"As a drainage district is not the State, nor a county, it must, in order for its property to be exempted from taxation under this provision, come within the designation of 'other municipal corporations.' Whether it is a municipal corporation in the sense in which those terms are therein used is the concrete question presented for determination."

Also, at l. c. 81, the court said:

"Our conclusion is that the defendant is a municipal corporation within the meaning of that term as used in the

provision of the Constitution dealing with tax-exemption, and that its property, used exclusively in the discharge of its prescribed governmental function, is exempt from taxation."

In the case of Grand River Drainage Dist. of Cass and Bates Counties v. Reid, 111 S. W. (2d) 151, 153, the court, in passing on the exemption from taxes on lands held by drainage districts, said:

"* * * Drainage districts are of statutory origin, possessing only such power as is expressly delegated or necessarily implied from those granted. So long as they proceed in conformity with the expressed or implied authority conferred, we perceive no reason why they may not successfully invoke the protection of section 6, art. 10 of our Constitution. Consult annotations in 3 A.L.R. 1439 and 101 A.L.R. 787; Robinson v. Indiana & Ark. L. & M. Co., 128 Ark. 550, 557 (4), 194 S. W. 870, 872 (4), 3 A.L.R. 1426. We, therefore, reserve for a record presenting the issue whether or not they may acquire and hold, under said sections 10766 or 11020, Mo. St. Ann., Secs. 10766, 11020, pp. 3494, 3659, lands tax exempt for commercial or speculative purposes or in non-conformity with the spirit of the statutes."

It will be noted that the court in this case held that if a drainage district holds real property under authority of the statutes and for the purposes therein stated, then such lands are exempt from taxes. However, it will be noted from this opinion that the court reserved its ruling in a case where such property is held by a drainage district for commercial or speculative purposes.

From your letter we assume that the lands in question are held by the district under authority of the statutes and not for speculative or commercial purposes. That being the case, then under the foregoing authorities these lands are exempt from taxation.

On the question of the exemption applying to delinquent taxes which were on the lands at the time of the acquisition of such lands by the district, we think the court,

in State ex rel. City of St. Louis v. Baumann, 153 S. W. (2d) 31, 34, has settled this question. There the court said:

"Even though taxes have been levied and assessed against a tract of land while under private ownership, if it be afterwards acquired by a governmental agency such taxes may not be collected. Bannon v. Burnes, C.C.W.D. Mo., 39 F. 892. And see cases cited in the notes in 30 A.L.R. 413 and 2 A.L.R. 1535. Since the City is seeking to purchase the land in its public governmental capacity and not as a mere fiduciary, the land becomes immune from taxation as soon as the City becomes the owner of it and such immunity would extend to taxes previously assessed and levied."

By this ruling if the taxes were levied and assessed against the lands before the district acquired them, such taxes may not be collected from the district, nor may the lands be sold for payment of the taxes while the same are in the possession of the district.

However, we call your attention to the fact that even if such taxes may not be collected while such lands are owned by the district, yet the lien for the taxes exists subject to the statute of limitations and this lien would be a cloud on the title and enforceable if and when the lands should pass into private ownership. This statement is supported by the ruling of the Supreme Court of the United States in the case of United States v. State of Alabama, 61 S. Ct. 1011, 313 U. S. 275. In that case the court ruled that the lien for taxes existing at the time the property comes into the possession of a tax-exempt body is not extinguished but such acquisition, prevents the holder of the lien from proceeding to enforce it. The court held, however, that such a lien is a cloud on the title, which, with the consent of the governmental owner for the enforcement of the same, could be prosecuted.

CONCLUSION

From the foregoing, it is the opinion of this department that property acquired by a drainage district is

Mr. George O. Dalton

-5-

1-19-43

not subject to sale for taxes during the time of the ownership of such lands by the drainage district.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

TWB:CP

COLLECTORS: In Section 11056, R. S. Mo. 1939, the words "calendar week" mean a period from Sunday to Saturday, and the words "year immediately preceding his election or appointment" mean the twelve months preceding the election or appointment and not the last calendar year.

January 25, 1943



Mr. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Sir:

We have your letter of recent date, in which you request an opinion, in the following language:

"I have been discussing the question of my bond for the coming year and in this connection my attention has been called to Section 11056, R. S. of Missouri, 1939, and particularly that part that provides 'that the amount of the bond shall be determined by a sum equal to the largest collections made during any calendar week of the year immediately preceding the election, plus ten per cent of said amount.' The other provision of Statute concerning a depository bond and my deposits under a 'County Collector's Fund' are being complied with in this county.

"There are two questions that arise and I respectfully ask the opinion of your department on the following:

1. What is meant by a calendar week?
2. What is meant by the year immediately preceding the election; does it mean 365 days preceding the election in November or the calendar year of 1941?"

We shall answer your questions in the order listed in your letter.

I.

What is meant by a calendar week?

In 62 C. J. 972, Section 21, we find the following:

"The word 'week,' both in law and in common conversation or writing, has two separate and distinct meanings. In its most accurate sense a week means a calendar week, or, as it has been termed, a biblical week, and is a definite period of time, commencing on Sunday and ending on Saturday, a particular period of time commencing immediately after twelve o'clock Saturday night and ending at twelve o'clock Saturday night seven days thereafter; seven consecutive days beginning with Sunday.

"In a broader sense 'week' has been termed a secular week, and as meaning a period of seven consecutive days beginning with any day, and it has been so defined by statute; and the week does not expire until seven full days have elapsed."

Again, on page 973 of the same Volume, we find the following:

"Where the word 'week' is used in a statute, judicial proceeding, or contract, the question as to which of the above two meanings is intended in any particular case is dependent largely upon the context in which it is used and the object to be attained by its use. Ordinarily, however, as so used

'week' means a calendar week extending from Sunday to Saturday, inclusive, unless it is apparent from the context and surrounding circumstances that it was intended to mean not necessarily a calendar week, but a period of seven days, or to refer to a week of six secular days only."

Likewise, the Supreme Court of Missouri, in the case of Russell v. Croy, 164 Mo. l. c. 93, has defined the word "week" as follows:

"The word 'week' in its most accurate sense means seven consecutive days beginning with Sunday; in that sense it is most usually used."

It will be seen from the foregoing that when the word "week" is used, it ordinarily means a period of time beginning with Sunday and ending with Saturday. Much more would that period of time be meant when the words "calendar week" are used. The words "calendar week" mean a week as marked off on the calendar. In Words and Phrases, Perm. Ed., Vol. 6, page 11, we find the following definitions of the term "calendar week":

"A calendar week is a block of seven days registered on the calendar in general use, beginning with Sunday and ending with Saturday."

"In construing statute containing term 'calendar week,' that term ordinarily refers to period of time from Sunday to Sunday as it appears on calendar, although term may consist of any seven days of given month, where language employed makes it clear such was intention of contracting parties or Legislature."

It is thus seen that the words "calendar week" ordinarily refer to a period of time beginning on Sunday and ending on Saturday.

Section 655, R. S. Missouri, 1939, provides in part as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * *"

We find nothing in the context of Section 11056, R. S. Missouri, 1939, which indicates that the legislature had in mind any meaning for the words "calendar week" different from their ordinary and usual meaning.

CONCLUSION

It is, therefore, the opinion of this office that the words "calendar week" as used in Section 11056, R. S. Missouri, 1939, mean a period of time beginning with Sunday and ending with Saturday.

II.

What is meant by the year immediately preceding the election; does it mean 365 days preceding the election in November or the calendar year of 1941?

That part of Section 11056, R. S. Missouri, 1939, which uses the language inquired about reads as follows:

" * * * Provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount: * * * *"

Section 655 of the Statutes, quoted from above, further provides as follows:

" * * * third, the word 'month' shall mean a calendar month, and the word 'year' shall mean a calendar year, unless otherwise expressed, and the word 'year' be equivalent to the words 'year of our Lord;' * * * *"

By our own statutes, therefore, we must ascribe to the word "year" the meaning of "calendar year" unless another meaning is expressed or unless such meaning would be repugnant to the context of Section 11056.

In Glasgow v. Rowse, 43 Mo. l. c. 487, the Supreme Court of our state recognized the same rule of construction, but recognized that there were cases in which the word "year" did not mean "calendar year." The court there said:

"Unless otherwise expressed, the word 'year' will always be intended to mean a calendar year; but when applied to matters of revenue, the presumption is in favor of it referring to a fiscal year."

Again, in *State ex rel. v. Allison*, 155 Mo. l. c. 330, the Supreme Court, after quoting the provisions of what is now Section 655 of the Statutes as to the meaning of the word 'year,' said:

"That an artificial year for a particular purpose may be designated either in a matter of private contract or a public act, is unquestioned, and it is not unusual that such is the case in statutes relating to the public revenue."

So, we see that our Supreme Court has not hesitated to ascribe to the word "year" a different meaning than "calendar year" when the context of a statute indicates that the legislature had a different meaning in mind. The courts of other states have held likewise. In *Sims v. City*, 190 Wash. 62, 66 Pac. (2d) 863, 864, the court said:

"Ordinarily, the term 'year,' when used in a statute, is presumed to refer to the calendar year. *Virginia-Carolina Chemical Co. v. Wellbrock*, 143 S. C. 51, 141 S. E. 103. But if the context in which it is used indicates that the legislative intent was otherwise, the term may be construed to mean 'fiscal year,' a period of 365 days, or 12 months. (Cases cited.) "

Many Missouri statutes could be cited in which the context clearly shows that the word "year" as used therein could not have been intended to mean "calendar year." For instance, Section 1517, R. S. Missouri, 1939, provides that no person shall be entitled to a divorce who has not resided within the state "one whole year next before the filing of the petition." No one has ever contended that the word "year" in such statute meant "calendar year," but it has always been construed to mean the twelve months immediately preceding the day on which the petition is filed. Likewise, statutes of limitation all provide that no action shall be had unless commenced within

a certain number of years after the cause of action has accrued. The word "years" in such statutes has always been construed to mean periods of twelve months after the date of the accrual of a cause of action. Many other such statutes could be referred to.

It, therefore, becomes necessary for us to consider the context of the statute in which the words inquired about are used. The purpose of the proviso quoted above, in which the language inquired about appears, is to provide some rule by which the amount of the collector's bond shall be determined. It should be noted that the legislature used the term "calendar week" in that very same proviso. If the legislature, in referring to the "year" in that proviso, had meant the "calendar year," it would seem that they would have so specified, since they did specify what kind of week they meant. On the contrary, the legislature used the words "year immediately preceding his election or appointment." The word "immediately" is defined in Webster's New International Dictionary as meaning "without interval of time." Applying this meaning to the word as used in the proviso under consideration, the language would mean the year which runs right up to the date of the election of the collector, or the year between which and the date of the election there is no interval of time. Had the legislature meant "calendar year," they could have expressed such meaning by using the word "calendar" before the word "year," as they did in connection with the word "week," or they could have said "the year before the year of his election." By using the language, "the year immediately preceding his election," we think the legislature meant the twelve months prior to the date of his election.

Our construction, as above set out, is in line with decisions from courts of other states. For instance, in the case of *People v. Eschelman*, 165 Pac. 260, (Colo.), the court held that in a statute providing that every citizen owning agricultural land within a certain district who had paid property taxes within such district "during the year preceding" such election shall be entitled to vote, the words "year preceding" meant the twelve months preceding the election and not the calendar year preceding the election.

Likewise, in the case of *Paetz v. State*, 107 N. W. 1090, (Wis.), the court, in construing a statute which provided that if a person should be convicted a second or subsequent time for the same offense during any year, the punishment should be

Mr. George O. Dalton

-8-

January 25, 1943

increased, held that the words "during any year" meant the ensuing year from the date of the first conviction and not a calendar year.

CONCLUSION

It is, therefore, the opinion of this office that the words "year immediately preceding his election or appointment" as used in Section 11056, R. S. Missouri, 1939, mean the twelve months prior to the date of the election or appointment of the collector and not the last calendar year before such election or appointment.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

HHK:HR

COUNTY OFFICERS: County required to furnish necessary supplies for county officers if same has been contemplated in the budget.

March 27, 1943.

3-30
FILED

21

Mr. George O. Dalton
Collector
Marion County
Hannibal, Missouri

Dear Mr. Dalton:

This will acknowledge receipt of your letter of March 23d in which you request an opinion of this Department. Your request, omitting caption and signature, is as follows:

"Will you please advise me just what authority the County Collector has to purchase necessities for his office such as, desks, chairs, typewriters, stationery, books and other necessary supplies.

"As a matter of common sense and cooperation, I have made every effort to cooperate with the County Court and conform to my budget figures when major purchases are made.

"However, I shall very much appreciate your opinion which I feel will greatly enlighten me as to this subject. "

In answer to your question, we will first cite you to Section 2480, R. S. Mo. 1939, which provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county,

and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In the case of *Ewing v. Vernon County*, 216 Mo. 681, the court held that it is the duty of the county to provide and pay for the necessary janitor services for the office of county recorder, and in that case, where the county refused and the recorder paid for the necessary services, he was allowed to recover the amount which he had paid.

Again, in *Harkreader v. Vernon County*, 216 Mo. 696, the court held that it was the duty of the county to pay for the water and light used in the jail, after the sheriff was forced to pay for such services himself.

And we wish to cite you to the case of *Buchanan v. Ralls County*, 222 S. W. 1002, where it was held that it is the duty of the county to furnish the treasurer of the county with suitable office space, heat, lights and janitor service.

There seems to be no doubt that the county shall pay for the maintenance of offices of the various county officers and furnish the necessary supplies of such offices. However, the cases cited above were all decided prior to the budget act for the different counties, which is in force and effect in the State of Missouri. This budget act is found in Chapter 73 of the Revised Statutes of Missouri for 1939. Section 10912 of said act provides as follows:

"It is hereby made the express duty of every officer claiming any payment

for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

Conclusion.

It is the conclusion of this Department that the county shall furnish necessary supplies for the various county

Mr. George O. Dalton

-4-

March 27, 1943.

officers, and, following the cases cited above, it appears that in several instances where the county court has refused so to do, that the county officer, after purchasing such supplies himself, has been able to recover the amount so expended. However, under the budget act as cited above, before any supplies may be purchased in this manner, it is necessary that they be considered and placed in the county budget at the time such budget is made up.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

ROADS AND BRIDGES: Town board may vote by mail and may on subsequent appointments of commissioners declare their first, second and third choice.

March 30, 1943

Honorable W. M. Dawes
Presiding Judge of County Court
Ripley County
Oxly, Missouri

4/✓
FILED
21

Dear Judge Dawes:

We are in receipt of your request for an opinion, under date of March 26, 1943, which reads as follows:

"I am writing you for your opinion of Sec. 8026 Revised Statutes of Missouri, 1929, in regard to the appointment of road commissioners.

"The part that is not clear to me is after the district is organized and they have three commissioners appointed, one for a term of three years, one for two years, and one for one year, should the mayor and city council, where the city is a greater distance than ten miles of the meeting place of the county court, send in names of first, second and third choice, or should they just send in one name as there is just one to be appointed at the February Term of court each year thereafter?"

Section 8026 R. S. Missouri, 1929, mentioned in your request, is now Section 8675 R. S. Missouri, 1939.

Section 8675, supra, reads as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together

with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided,

that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

It will be noticed in the proviso of the above section that the legislature allowed the mayor and councilmen, of cities in special road districts located more than ten miles from the meeting place of the county court where the road commissioner or commissioners are appointed, to elect to vote by mail and designate their first, second and third choice.

This statute was enacted for the purpose of economy and making it certain that the road commissioner, or commissioners, would be appointed at the time of the election.

Under the statute it is not mandatory that they vote by mail, but, if they do vote by mail they must designate their first, second and third choice, even after the first meeting after the organization of the road district. Where only one commissioner is to be appointed, if the mayor and council of such city elect to cast their vote by mail, under this section they should designate their first, second and third choice, and in that way the commissioner would be appointed.

That such a procedure should be followed was held in the case of *State ex inf. Holt, Pros. Attorney, ex rel. Jones v. Meyer*, 12 S. V. (2d) 489, l. c. 490, where the court said:

" * * * We have ruled the statute as originally enacted authorized each member of the meeting to cast a vote; and, if the choice designated in the certificate is to be given the same consideration as though a member was present and voting, then his choice designated in the certificate must be counted as a vote for commissioner. The requirement that the first, second, and third choice be designated has reference to the first meeting

after the organization of the district, when three commissioners are to be appointed. Thereafter, at a meeting for the appointment of only one commissioner, the first ballot might not result in an appointment; if so, on the second ballot the absent member's second choice could be voted, and so as to his third choice." (Underscoring ours.)

In the last paragraph in the above case the court specifically said:

" * * * Thereafter, at a meeting for the appointment of only one commissioner, the first ballot might not result in an appointment; if so, on the second ballot the absent member's second choice could be voted, and so as to his third choice." (Underscoring ours.)

The court clearly held that where an appointment was to be made of one commissioner, that is at some future meeting after the first meeting, subsequent to the organization of the road district, if the mayor and council should elect to designate by mail, they should designate their first, second and third choice. The above case is the only and ruling case on this section of the statute.

CONCLUSION

It is, therefore, the opinion of this department, that under Section 8675 R. S. Missouri, 1939, the mayor and city council of a city located a distance of more than ten miles from the place of the meeting of the county court where a road commissioner is to be appointed may send in their designation for said appointment or appointments by mail.

Honorable W. M. Dawes

(5)

March 30, 1943

It is further the opinion of this department, that if the mayor and council of a city in a special road district, which city is located more than eight miles from the meeting place of the county court where a road commissioner, or commissioner is to be appointed, elect to cast their vote by mail, then they should, even though one commissioner only is to be appointed, designate their first, second and third choice.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

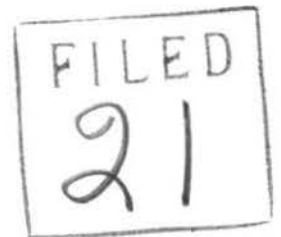
APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY COLLECTOR: Shall collect drainage district taxes.

July 12, 1943



Mr. George O. Dalton, Collector
Marion County
Hannibal, Missouri

Filed #21

Dear Mr. Dalton:

This will acknowledge receipt of your letter of recent date wherein you wish to be advised as to the proper person to collect drainage district tax. The full text of your letter is as follows:

"I understand that as County Collector I am the designated one under the Statutes to collect Drainage Taxes.

"A local attorney, who acts for and in behalf of the Drainage District here, insists on collecting these taxes even after the Drainage District Tax Book is placed in my hands to collect the charges thereon.

"Will you please advise what recourse that I have under the Law to prevent him from doing the collecting, and how I may recover the commission due me on the collections that he has made?

"Will you also please advise me what commission the Collector would be allowed under Section 12346 Revised Statutes of Missouri, 1939?

"Since a question of Law is involved, I am hoping that you will render your opinion in this matter at your earliest convenience."

Mr. George O. Dalton, #2

Your letter does not state whether the drainage district in your county, the one under discussion, was organized under the circuit court of the county court. Neither does your letter inform us whether or not your county is organized under township bases. It will be necessary to point out the situation with two sets of possible organization forms and with two different tax collection agencies in mind.

The statutes of our state provide that a drainage district may be organized under the county court or it may secure authority for organization from the circuit court. At Chapter 79, Article 3, Sections 12398-12454 R. S. Mo., 1939, we find in detail the steps required for organization of drainage districts. We do not quote these statutes because of their great length, but merely cite same for your information and guidance.

Concerning ourselves with the matter of collection of taxes in drainage districts we find that Section 12416 R. S. Mo., 1939, provides that the county collector collect taxes. The full text of this section is as follows:

"It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate, to receive the 'drainage tax book' each year and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. He is further directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other properties. Where any tract

Mr. George O. Dalton, #3

or part thereof has been divided and sold or transferred, the collector shall receive taxes on any part of any tract, piece or parcel of land or other property, charged with such taxes and give his receipt accordingly. The 'drainage tax book' shall be the warrant and authority of the collector for making such demand and collection. The said collector shall pay over and account for all moneys collected thereon each year to the county treasurer at the time he pays over state and county taxes. The collector shall give bond payable to the drainage district for the probable amount of all drainage taxes to be collected in any one year conditioned for the faithful performance of all his duties in accordance with this article. Said bond shall be signed by at least two resident freeholders in the county or by a surety company authorized to transact business in the state. The bond shall be approved by the court and the premium, if any, may be paid out of any funds belonging to the district."

Looking to the decisions in the state as they apply to drainage districts, we find that they are public corporations, being political subdivisions of the state, exercising governmental functions, and not private corporations; and when so organized the county court administers their entire affairs. We further find that since it is a public corporation it is a creation of the statute and only those powers enumerated in the statute are conferred upon the corporation. In other words, it is strictly limited in its acts to those powers specifically stated in our statutes. Authority for this may be found in State ex rel.

Mr. George O. Dalton, #4

Applegate v. Taylor, 123 S. W. 892, Squaw Creek Drainage District v. Turney, 138 S. W. 12, Houck v. Little River Drainage District, 154 S. W. 739, State ex rel. Manion v. Albany Drainage District, 234 S. W. 339, Wilson v. King's Lake Drainage District, 158 S. W. 931, and Granes v. Little Tarkio Drainage District, 134 S. W. 2d 70.

Looking now to drainage district levees and water supplies, we find in Article 1, Chapter 79, Sections 12324-12389 R. S. Mo., 1939, inclusive, the statutory articles on drainage districts incorporated in circuit courts of the state. In these sections the entire machinery of the districts is outlined and the powers and functions of drainage district officers are set out in great detail. The board of supervisors is provided for, and their particular duties and powers clearly and carefully defined. Under the terms and provisions of the statutes the board of directors is given no right or authority to appoint collectors of revenue for the purpose of tax collection. The only appointments which may be made by the board are outlined in Section 12331 R. S. Mo., 1939, and we do not find in this section any authority to appoint a collector of revenue.

We do find, at Section 12342 R. S. Mo., 1939, the authority for the collector of revenue to collect drainage tax:

"It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate to receive the 'drainage tax book' each year, and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. He is further

Mr. George O. Dalton, #5

directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other properties. Where any tract or part thereof has been divided and sold or transferred, the collector shall receive taxes on any part of any tract, piece or parcel of land or other property, charged with such taxes and give his receipt accordingly. The above and foregoing 'drainage tax book' shall be the warrant and authority of the collector for making such demand and collection. The said collector shall make due return of all 'drainage tax books' each year to the secretary of the board of supervisors of the aforesaid drainage district, and shall pay over and account for all moneys collected thereon each year to the treasurer of said district at the same time when he pays over state and county taxes. Said collector shall in said 'drainage tax book,' verify by affidavit his said return. The said secretary shall each year, within ten days after the return of said collector is delivered to him, prepare and certify to said collector a 'drainage back tax book' containing the list of lands and other property so returned by said collector as delinquent, deliver the same to him and take his receipt therefor, and said collector shall proceed to collect such delinquent drainage taxes and demand payment therefor in the same manner as herein provided for the collection of current drainage taxes. Before re-

Mr. George O. Dalton, #6

ceiving the aforesaid 'drainage tax book' the collector of each county in which lands or other property of the drainage district are located shall execute to the board of supervisors of the district a bond with at least two good and sufficient sureties in a sum that is equal to the probable amount of any annual installment of said tax to be collected by him during any one year, conditioned that said collector shall pay over and account for all taxes so collected by him according to law. Said bond after approval by said board of supervisors shall be deposited with the secretary of the board of supervisors, who shall be custodian thereof and who shall produce same for inspection and use as evidence whenever and wherever lawfully requested to do."

In counties where a township organization plan has been adopted we find that drainage district tax as taxes may be collected either by the county collector or the township collector depending upon which organization obtains in the particular county.

From our reading of the statutes and decisions, we find that the board of directors in the drainage district have nothing to do with tax collection, and this is sustained in an early case in the state, Drainage District No. 1v. Charles Daudt, 71 Mo. App. 579.

Devoting our thoughts to the matter of the fees allowed collectors we find at Section 12470 the provision as to the amount of fees the collector may charge and we quote this section in full:

Mr. George O. Dalton, #7

"The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent of all such taxes collected, and for the collection of delinquent taxes for such they shall receive two per cent of all sums collected."

You may be under the impression that the same rule as to commission for delinquent tax collection applies to drainage tax laws as to general taxes. This, however, is not true for the drainage tax fees allowed the collector as authorized by Section 12470, supra, which we have just quoted and set out in full, are entirely different from Section 11182 R. S. Mo., 1939, which reads as follows:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two per cent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

Answering your question as to the proper remedy where an authorized person collects taxes it is well to remember that an appropriate legal remedy will be likely to recover fees in the hands of the unauthorized collector. You are reminded that the county court is an interested party thereto, and we further suggest that your prosecuting attorney should be consulted in this matter.

Mr. George O. Dalton, #8

CONCLUSION

The county collector shall collect drainage district taxes in counties which have not adopted the township organization plan, and in those counties operating under the township plan the township collector is authorized to collect taxes.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:FS

VILLAGES: Trustees may pass ordinances for the taxation
TAXATION: of dance halls and pin-ball machines, but have
no authority to tax juke boxes.

September 1, 1943

Hon. George N. Davis
Prosecuting Attorney
Macon County
Macon, Missouri

9-9
FILED

21

Dear Sir:

This will acknowledge receipt of your recent request for an opinion which reads as follows:

"Mr. Green, mayor of Gifford, a village, has asked me to find out for him if they have a right to tax pin-ball machines, juke boxes, and also dance halls.

"They have an ordinance to that effect and wish to enforce it.

"I do not find any specific authorization in the statutes in this regard."

It is well established that municipalities or political sub-divisions have only such power to levy taxes as may be derived from constitutional or legislative grants. As stated in *City of West Plains v. Noland*, 112 S.W. (2d) 79, 1. c. 81:

"The power of municipalities to levy taxes is derived from either a constitutional or legislative grant and in levying taxes cities are limited and restricted by these grants. *Kansas City, Mo. v. J. I. Case Threshing Mach. Co. et al.*, 337 Mo. 913, 87 S.W. 2d 195; *Kroger Grocery & Baking Co. v. City of St. Louis, Mo. Sup.*, 106 S.W. 2d 435, 111 A.L.R. 589; *Siemens v. Shreeve*, 317 Mo. 736, 296 S.W. 415."

Since Gifford is a village, we shall look to the statutory authority granted such villages for purpose of taxation. Section 7248, R. S. Missouri, 1939, is applicable to villages and provides that the Board of Trustees, which is the governing body of such village, shall have the power to pass ordinances to license, tax, regulate and prohibit certain games such as ball, tenpin alleys, billiards and pool tables, or other tables upon which games are played for pay or amusement, and further provides for licensing and regulating dramshops, tippling houses, public shows, circuses, theatrical and other amusements. Such Section reads in part as follows:

"Such board of trustees shall have power to pass by-laws and ordinances to prevent and remove nuisances;* *
* * to provide for licensing and regulating and prohibiting dramshops and tippling houses, public shows, circuses, theatrical and other amusements, to the distance of one-half mile from the corporate limits of such town; *
* * * to license, tax, regulate and prohibit ball and tenpin alleys, billiards and pool tables, or other tables upon which games are played for pay or amusement; to license, tax, regulate and prohibit all other games for pay or amusement: Provided, that no permission shall be given to bet money, property or other thing upon any game,
* * * * *

The words, "or other tables upon which games are played for pay or amusement", are broad enough to include pin-ball machines, and, likewise, the words, "dramshops and tippling houses, public shows, circuses, theatrical and other amusements", are also sufficient to include dance halls.

In *People ex rel. Nelson v. Sherrard State Bank*, 258 Ill. App. 168, it was held that where a number of items are enumerated in an enactment and then supplemented with the term "and other articles, goods", etc., such term means other articles and goods of a class and kind as previously enumerated.

As stated by the Court in *State ex rel. v. Gordon*, 268 Mo. 321, 1. c. 328, in construing the general words fol-

lowing specific words:

"One contention is that the statute 'authorizes, as one proposition, "any county . . . to incur an indebtedness for the purpose of building a courthouse, jail, poorhouse, county sanitarium, or other county buildings;"' that the 'italicized words mean buildings like those specifically mentioned and, therefore, mean 'courthouses' and, as a consequence, authorize a submission including two courthouses. This argument is designed, it seems, to avoid the force, if any, of the statute's use of the term 'courthouse' in the singular. The canon of construction invoked cannot be so employed. Its effect is to restrict the meaning of the general words to things of a character like those particularized. It does not warrant a construction of the general words as mere repetition, in the plural number, of the things specified in the singular. General words, under that canon, do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms. The contention made is not tenable."

It is our opinion that the well known doctrine of statutory construction, ejusdem generis, is applicable in this case. Thus, where general words follow specific words, the general words will be construed as applicable only to such classes or things as may be included by the particular or specific words. This rule is based upon the reason that if the General Assembly had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular or specific words. See State v. Eckhardt, 232 Mo. 49, l. c. 52.

In Pearson v. City of Seattle, 44 Pac. 884 and 885, 14 Wash. 438, it was held that the word amusement was synonymous with diversion, entertainment, recreation, pastime and sport so that a public dance would be a public amusement within the meaning of a paragraph of an ordinance providing that

every person who shall conduct any concert, show or any other public amusement within the City of Seattle, without obtaining a license therefor, would be guilty of a misdemeanor. In so holding the Court said:

"* * * And section 2 reads: '* * * *
That every person who, as proprietor, licensee, manager or agent, shall hereafter conduct, manage or superintend any circus, side-show, skating rink, opera, concert, show, exhibition, or other public amusement of any kind within the city of Seattle, without first having obtained a license therefor, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine in any sum not exceeding one hundred dollars (\$100), or by imprisonment in the city jail not exceeding thirty days, or by both such fine and imprisonment.* * * ' It is admitted by defendant's answer that the respondent conducted a dance in a place 'adjoining to' and 'connected with' his saloon, where intoxicating liquors were sold and disposed of, and where women solicited, for a salary, the sale of intoxicating liquors. This dance was therefore conducted in such a place and in such a manner as to require the payment of a license fee of \$1,000 per year, provided it was a public amusement. The license delivered to respondent did not specify the kind of amusement and the particular place licensed, as required by section 4 of the ordinance, but simply authorized the respondent to 'run a place of amusement' from February 4, 1893 to February 4, 1894. But it appears that respondent procured it for the purpose of conducting a dance, which he did conduct in the city, and for aught that appears in the record, with the knowledge of its officers, uninterruptedly, for a period of more than 11 months. Under these circumstances, we think the city, after receiving and retaining respondent's money, cannot consistently urge that the license was invalid by reason of informality, or even

September 1, 1943.

that it did not authorize the carrying on of the business in which respondent was engaged, and that, therefore, the license fee was voluntarily paid and cannot be reclaimed.

"But we are unable to see that the court erred in its conclusion that a public dance, conducted as this was by the respondent, was a public amusement, within the meaning of Ordinance No. 1790. Such was apparently the view of the city officials; for otherwise there would have been no necessity for passing Ordinance No. 3152, declaring such dances a nuisance. By the terms of Ordinance No. 1790 a skating rink is a public amusement, and it would seem that a public dance might be included in the same category without violating the rule of construction contended for by appellant, --that no amusements can be included within the terms 'other public amusement' but such as are of the same general character as those specified. Moreover, Webster says that the word 'amusement' is synonymous with 'diversion,' 'entertainment,' 'recreation,' 'pastime,' 'sport,' and if that be true a public dance is a public amusement."

In view of this definition of amusement, there is no question but that a dance hall may be taxed under Section 7248, supra. However, we find no statutory authority broad enough to permit such a village to tax juke boxes. There is no doubt but that under the Police Power a village may regulate the use of juke boxes. However, this will not permit a tax on same in the absence of some statutory or constitutional grant.

CONCLUSION

Therefore, it is the opinion of this department that under Section 7348, supra, the Board of Trustees of the Village of Gifford may pass ordinances for the purpose of taxing pin-ball machines and dance halls but have no authority to tax juke boxes.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ROY McKITTRICK
Attorney General

2 ✓
TAXATION: Priority of tax liens, General County
and State taxes in relation to general
municipal tax liens.

December 29, 1943
1/11/44

FILED
21

Honorable Wilbur F. Daniels
Prosecuting Attorney
Fayette, Missouri

Dear Mr. Daniels:

This is an acknowledgment of your letter of inquiry
to the General on December 27, 1943, which is as follows:

"I would deeply appreciate an opinion
on the following question, to-wit: If land
is sold by the County of Howard for delinquent
taxes does said sale cut off and extinguish
the lien of the City of Fayette for back taxes
on the same land?"

The case of State v. Baumann, 160 S.W. (2d) 697 passed
upon the question as to whether the City of St. Louis--- a
municipal corporation---while under the provisions of the
Jones-Munger law, had an equality of lien for its general city
and school taxes with the lien for general state and county
taxes. The court held that equality of such liens is the
general rule. In regard to the status of such liens of cities
outside the City of St. Louis in relation to a general county
and state tax lien such court at l.c. 699 held:

***Outside the city of St. Louis, under the
Jones-Munger Act, sales for state and county
taxes are made by the county collector and
sales for city taxes are made by the city col-
lector under a different advertisement. One
purpose of Sections 11149 and 11152 evidently
is to prevent a sale by the county collector
from destroying the lien for city taxes and
to prevent a sale by the city collector from
destroying the lien for state and county taxes,
both liens being on an equality. Section 11152
requires the purchaser, before receiving a deed,
to pay prior unpaid taxes, but, as the county
collector is not authorized to receive city taxes
and the city collector is not authorized to receive

Honorable Wilbur F. Daniels -2-

Dec. 29, 1943

state and county taxes, Section 11149 makes the deed subject to such unpaid prior taxes as the collector is not authorized to collect. That is, the deed of the county collector is subject to prior unpaid city taxes and the deed of the city collector is subject to prior unpaid state and county taxes. The City of St. Louis, being both a city and a county, the same officer would there collect all the prior general taxes, state, county and city, before delivering the deed.***"

Therefore, it is the opinion of this department that a sale by the county collector for general county and state taxes does not destroy the lien for city taxes "both liens being on an equality".

Respectfully submitted,

SVM:EH

S. V. MEDLING
Assistant Attorney General

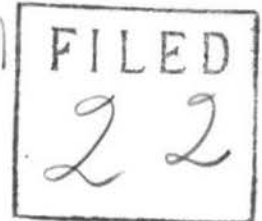
APPROVED:

ROY McKITTRICK
Attorney General

TAXATION: Limitation of taxes by county.

January 11, 1943

Mr. W. E. DeWitt, Assessor
McDonald County
Pineville, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submitted the following question:

"Will you please advise me as to the maximum county revenue levy that can be made in a county with assessed valuation of six million dollars or under. Also as to the maximum county revenue levy that can be made in counties having assessed valuations between six and ten million dollars."

Your inquiry is answered by the provisions of Section 11 of Article X of the Constitution of Missouri, as amended by the Constitutional Amendment which was adopted at the General Election in 1942. Section 11 of said Article, as amended, Laws of Missouri, 1941, page 719, reads as follows, in part:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes the annual rate on

property, in counties having thirty million dollars or less, shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation.

*****"

By this section all counties having a valuation of thirty million dollars or less, may not make a levy for county purposes in excess of fifty cents on the hundred dollars valuation; counties having thirty million dollars or more, valuation, may not make a levy for county purposes in excess of thirty-five cents on the hundred dollars valuation.

In addition to these rates a special road and bridge tax may be levied. Under Section 22 of Article X of the Constitution, this levy may be made in all counties, not to exceed twenty-five cents on each hundred dollars valuation.

We also refer you to Section 23 of Article X of the Constitution, which would authorize an additional levy for road and bridge purposes when authorized by a vote of the qualified voters of a road district.

CONCLUSION

From the foregoing it is the opinion of this department that the maximum rate of levy which may be made by counties having a valuation of thirty million dollars or less is fifty cents on the hundred dollars valuation; in addition to this levy for general purposes a special road and bridge levy may be made in all counties not to exceed twenty-five cents on the hundred dollars valuation and, if authorized by a vote,

Mr. W. E. DeWitt, Assessor

-3-

1-11-43

a levy in addition to this, not to exceed fifty cents on the hundred dollars valuation, may be made for road and bridge purposes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

SCHOOLS)
SECRETARY AND ()
TREASURER)
COMPENSATION ()

Compensation of Secretary and
Treasurer of Board.

September 14, 1943

Mr. Wesley A. Deneke, Superintendent
Flat River, Missouri

9/17
FILED

22

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of the compensation of the Secretary, and Treasurer of a School Board.

We think your question is answered by Sec. 10501 Laws of Mo. 1941, page 536, which reads in part as follows:

"No member of any public school board of any city, town or village in this state having less than ~~then~~ twenty five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars and that of the treasurer shall not exceed fifty dollars for any one year: " ***

This section is plain and unambiguous and does not need construction. It fixes the maximum amount which the Board may pay the secretary or treasurer.

C O N C L U S I O N

It is therefore the opinion of this department that the maximum amount of salary which may be paid

Mr. Wesley A. Deneke, Supt. -2-

Sept. 14, 1943

to the secretary of a School Board in a district of a city, town or village is one hundred and fifty dollars, the maximum salary which may be paid to the treasurer of such Board is fifty dollars.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

TWB:LeC

APPROVED:

ROY McKITTRICK
Attorney General

ELECTIONS:

ABSENTEE VOTING:

Senate Bill No. 31 excuses nonregistration of persons in military or naval service voting absentee ballots. Registration laws apply to such persons not voting absentee.

November 26, 1943

11/30



Honorable C. W. Detjen
Attorney for St. Louis County Election Board
Suite 418-19
511 Locust Street
St. Louis, Missouri

Dear Mr. Detjen:

Under date of October 29, 1943, you wrote this office requesting an opinion, as follows:

"I am writing to you as Attorney for the St. Louis County Election Board, serving by appointment of the Board under the provisions of Section 11908 R.S. Mo. 1939. The Board desires your ruling on the following questions pertaining to the St. Louis County Registration law, Chapter 76, Article 18, R.S. Mo. 1939:

"1. While Laws 1943, Section 11478A, seem to give any person in the military service, otherwise eligible to vote, a right to cast an absentee ballot even though he is not registered, there seems to be no provision authorizing such a person to vote at the polls, if he happens to return to his home on election day. This raises several questions, namely:

"a. Has the Election Board the right to enter his name on the registration lists in spite of the limitation in Section 11897 R.S. Mo. 1939 prohibiting the Board from registering new voters later than five weeks before general or primary election? In other

words does Section 7, Article 8 of the Constitution exempt him from the necessity of registering in advance?

"b. Has the Board the authority to permit him to vote without putting his name on the registration lists, if he furnishes satisfactory evidence that he is qualified to vote and was unable to register because of military service?

"2. If a voter is in military service and has not voted in person or by absentee ballot at any election during the past two years, should he be removed from the registration lists as provided in Section 11897 R. S. Mo. 1939?

"a. If it is held that the name should be stricken off of the registration lists for failure to vote, it appears that the voter could still cast an absentee ballot under Section 11478A, Laws 1943, but could he vote in person without having his name on the registration lists, if he happened to be at home at the time of the election?

"Your opinion in the above connection will be appreciated."

The limitation contained in Section 11897, R. S. Mo., 1939, mentioned in your letter, is as follows:

" * * * Provided further, that no such registration of new voters shall be permitted later than five weeks before a general or primary election, or sooner than fifteen days after an election in counties included in this article, and transfers of registration or reinstatements of voters shall not be permitted later than twenty-one days before any such election. The board of election commissioners shall order a canvass of

all registered voters not later than four weeks before each election and revise each canvass in the same manner as hereinafter provided for in this article."

In answering your questions it will be necessary to refer to the recently enacted laws passed by the 62nd General Assembly, Senate Bill 31, Laws of 1943; page 523, Senate Bill 41, Laws of 1943, page 526, Public Law No. 712, enacted by the 77th Congress, 2nd Session, (House Resolution 7416), and the Constitution of Missouri.

The provisions of the Missouri Constitution to be considered are Section 7 (referred to in your letter) and Section 9, Article VIII, which sections are as follows:

"Sec. 7. For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service either civil, or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the State, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison."

"Sec. 9. Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

Military service does not cause a loss of voting residence, and the legislature has been directed to provide a method for persons absent from the state on military or naval service to vote. The two bills above mentioned are following

this constitutional mandate and the provisions of Public Law No. 712, enacted by the 77th Congress.

Section 11478a, mentioned in your letter, is a portion of Senate Bill 31, Laws of 1943, page 523. This section is as follows:

"Any person being a duly qualified elector of the State of Missouri who expects to be absent from the State of Missouri by virtue of the fact that such person is a member of any of the various branches of the armed services of the United States as same may be defined by the Executive Departments of the United States of America, and who is so absent on the day of holding any special, general or primary election at which any candidates are chosen or elected for any congressional, state, district, county, town, city, village, precinct or judicial office or at which questions of public policy are submitted may vote at such election as hereinafter provided, regardless of whether or not said elector has complied with the provisions of any laws requiring the registration of voters."

In Senate Bill 41, Laws of 1943, page 526 and following, is Section 11474a, on page 530, a part of which is as follows:

"In lieu of the foregoing provisions for voting an absentee ballot any qualified elector who is absent from the state on military or naval service, and who may on the occurrence of any election mentioned in Section 11470 of this Act, be absent from his voting precinct because his duties require him to be without the State on the day of such election, may vote an absentee ballot by the following procedure: * * * "

This section contains seven numbered subsections. The first numbered subsection provides that the application by post-

card, provided for by Public Law No. 712 (H. R. 7416), enacted by the 77th Congress, when received by the Secretary of State, shall be taken as an application to vote an absentee ballot.

In subsection 4, page 533, is the following:

" * * * The Secretary of State, as applications and requests for absentee ballots are received by him, shall, from time to time, prepare for, and cause to be transmitted to the Clerks of the County Courts, or proper official in districts which have boards of election commissioners, of the residence of such voter, statements containing the names and addresses of such absent voters and appropriate information appearing on the application or request for the absentee ballot pertaining to such absent voter. Upon receipt of such statements it shall be the duty of such officials to post in a conspicuous public place in the office of such officials the names of such absent voters and their residence as shown by the said statement."

Senate Bill 31 also provides for application for absentee ballots in Section 11478b, Laws of 1943, page 524:

"Upon the request of such person in writing, by letter or otherwise, made not more than thirty nor less than two days prior to the date of such election to the county clerk or board of election commissioners, if any, or other official charged herein with the duty of furnishing ballots to such applicants, hereinafter referred to as an election official stating that at the time of such request he is a duly qualified elector of the State of Missouri and reasonably expects at the time of such election to be absent from the State of Missouri or from the United States

on the day of such election due to the fact that such person is in the armed services of the United States, such election official shall promptly append the name of such person to the list of applicants for absentee ballots in the manner and form provided for by Section 11472, Revised Statutes of Missouri, 1939, and such election official shall promptly mail to such person absentee ballot in the form and manner hereinafter provided: Provided further that written application for the mailing of absentee ballot to such person in the armed services of the United States may be made upon affidavit submitted by the father, mother or spouse of such person, in which case application and affidavit of the father, mother or spouse so applying shall contain a statement as to the military status of the person in the armed services for whom application is being made, his last known address and shall recite that no other similar application is being made on behalf of such person to the best of affiant's information and belief. When such request is made in connection with a primary election, ballots for each political party will be mailed with instructions that voter shall vote one ballot and return the remaining unvoted ballot. In the event more than one request or application for absentee ballot for such person or voter in the armed services should be received by the election official above referred to, an absentee ballot shall be mailed to such person in the armed services only upon and in relation to the first request or application made or received."

Senate Bill 31 was introduced February 11, 1943, and was approved June 25, 1943. Senate Bill 41 was introduced February 18, 1943, and was approved July 21, 1943.

By the provisions of Section 36, Article IV, of the Missouri Constitution and Section 659, R. S. Mo., 1939, both of

these statutes would become effective at the same time, ninety days after the adjournment of the session, as neither contained any clause making it effective earlier.

In considering statutes and determining their meaning there are certain rules of statutory construction which must be borne in mind. The primary rule of statutory construction is to ascertain and give effect to the intention of the lawmakers in enacting the law. *Meyering v. Miller*, 51 S. W. (2d) 65, 330 Mo. 885. A statute should be construed to give effect to the legislative intent. *Kelly v. Social Security Commission*, 137 S. W. (2d) 989. Statutes should receive a sensible construction which will effect the legislative intention. *Chrisman v. Terminal R. R. Assn.*, 157 S. W. (2d) 230.

Where two acts are passed at the same legislative session, relating to the same subject matter, they are in *pari materia* and must be construed together. In the case of *State v. Harris*, 87 S. W. (2d) 1026, at l. c. 1029, is the following discussion of rules of statutory construction:

"Assuming for the purpose of this case that section 4428 is a valid enactment, we have, then, two legislative acts passed at the same session of the Legislature, taking effect at the same time and relating to the same general subject. They should be construed together and if possible harmonized so as to give effect to each. *Gasconade County v. Gordon et al.*, 241 Mo. 569, 581, 145 S. W. 1160. If, however, the statutes are necessarily inconsistent, that which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature. *Gasconade County v. Gordon et al.*, *supra*. The rule is thus stated in *State ex rel. County of Buchanan v. Fulks et al.*, 296 Mo. 614, 626, 247 S. W. 129, 132, quoting from 36 Cyc. 1151:

"Where there is one statute dealing with a subject in general and comprehensive terms

and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'

"See, also, announcing the same rule, *State ex inf. Attorney General v. Dabbs*, 182 Mo. 359, 81 S. W. 1148; *Gilkeson v. Missouri Pac. R. Co.*, 222 Mo. 173, 204, 121 S. W. 138, 24 L. R. A. (N.S.) 844, 17 Ann. Cas. 763; *State ex rel. American Central Ins. Co. v. Gehner*, 315 Mo. 1126, 1132, 280 S. W. 416, 418."

Where one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject more specifically, the two should be read together, but if a conflict exists, the special one, treating a part of the subject more specifically, should prevail over the general. *State ex rel. R. Newton McDowell, Inc. v. Smith*, 67 S. W. (2d) 50, 334 Mo. 653; *State ex rel. Bldg. & Loan Assn. v. Brown*, 68 S. W. (2d) 55, 334 Mo. 781.

Of two statutes passed at the same session of the legislature, if there is a conflict, the one last approved will prevail. *Lambert v. Board of Trustees*, (Ky.) 152 S. W. 802, 1. c. 805:

"And, in so far as two such acts are irreconcilable, the act which is approved latest supersedes the earlier act, and is to be treated as the expression of the legislative will upon the subject. *Swinney v. Ft. Wayne, etc., R. R. Co.*, 59 Ind. 205;

Wright v. Tipton County, 82 Ind. 335;
Gibbons v. Brittenum, 56 Miss. 249; Gar-
rison v. Richards (Tex. Civ. App.) 107
S. W. 861. * * * "

Garrison v. Richards, (Tex. Civ. App.) 107 S. W. 861,
1. c. 865:

" * * * Where two acts are passed at the
same session of the Legislature they
should be construed together as one act,
and, if possible, so that both may stand.
McGrady v. Terrell, 93 Tex. 427, 84 S. W.
641; Lewis' Suth. on Stat. Const. sec. 268.
But where the two are repugnant and ir-
reconcilable, the one approved last repeals
the other to the extent of the repugnancy.
Bailey v. Drane, 96 Tenn. 16, 33 S. W. 573;
Lewis' Suth. on Stat. Const. sec. 280; 26
Amer. & Eng. Ency. of Law (2d Ed.) 736.
The above rule applies also where both acts
go into effect on the same day. * * *"

Peavy v. McCombs et al., (Idaho) 140 Pac. 965, 1. c.
968:

" * * * While it is not necessary for the
purposes of this case to lay down a gen-
eral rule for all cases, we will say in
passing that we are inclined to the opinion
that, in case of an irreconcilable conflict
between two acts passed at the same session
of the Legislature, the one should prevail
which was last approved by the Governor;
the approval of the Governor being the last
act in the process of legislation under our
Constitution and statutes."

We have to consider two special statutes relating to
absentee voting by persons in military or naval service, ap-
proved by the Governor at different times, and general stat-
utes relating to the registration of voters and voting of
absentee ballots.

The intention of the legislature is obvious. It was to enable persons who might not be able to vote by reason of military or naval service to cast a vote at coming elections.

In the light of the foregoing rules of construction, your questions will now be discussed. Turning to your question (a) under paragraph 1, Section 11897, referred to, is a general statute pertaining to the registration of voters in counties which fall within the population classification defined in Article 18, Chapter 76, R. S. Mo., 1939, of which this section is a part. Section 11478a, Laws of 1943, page 524, is a later enacted special law applying only to voters who are in the military or naval service and who expect to be absent from their voting precinct, and, in regard to the classes of persons covered by this statute, would take precedence over the provisions of Section 11897 if any conflict should exist. By express provision, Section 11478a exempts the electors who expect to be absent from their voting precinct from the provision of any registration law:

" * * * regardless of whether or not said elector has complied with the provisions of any laws requiring the registration of voters."

Under this provision there is no occasion for placing on the registration lists the names of absentee voters in the military or naval service who follow the provisions of Senate Bill 31 relating to absentee voting. Senate Bill 31, enacted by the 62 General Assembly, Laws of 1943, page 523, contains no provision for late registration of electors who are in the military and naval service and who are in their proper voting precincts and who do not expect to be absent on the day of the election. There could then be no conflict and the provisions of Section 11897 would apply, and there could be no late registration, in the absence of some other provision in the law authorizing late registration.

What is said in regard to question (a) also applies to question (b). The provision of the recently enacted laws only treat of voters who expect to be absent and have followed the prescribed procedure. It could not cover registration of persons who did not expect to be absent and who had not followed the prescribed procedure for absentee voters.

November 26, 1943

In regard to your paragraph 2, the laws here under consideration do not require the names of voters absent in the military or naval service to be kept on the registration lists. If any elector has failed to comply with the provisions of Section 11897, R. S. Mo., 1939, the name of such elector should be removed from the registration lists as provided by said section.

Answering your question (a) under paragraph 2, a voter in military or naval service whose name has been stricken from the registration lists could not vote in person, but by following the prescribed absentee procedure could vote an absentee ballot, if the voter expects to be absent from his precinct on election day.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:HR

BARBERS:
LICENSING:

Right of Board to waive penalty fees under Section
10132, R. S. Mo. 1939.

November 18, 1943

11/24



State Board of Barber Examiners
620 South Kimbrough Avenue
Springfield, Missouri

Attention: L. N. Dixon, Secretary

Gentlemen:

This will acknowledge receipt of your request for an
opinion under date of November 14, 1943, which reads as follows:

"Is it possible under the existing law,
Chapter 67 Sec. 10132 R.S. Mo. 1939 page
2664 for the State Board of Barber Examin-
ers or any other person to authorize the
waiving of the \$5.00 penalty clause for
failure to renew their State Barber License
in the require time, even though they pre-
sent an honorable discharge from the Army
or other branches of the Armed Service of
our Country, and swear that because of such
Service they were unable to renew their
license in the time allowed."

The section referred to in your letter reads as follows:

"Every person now engaged in the occupation
of barbering in this state shall, within
ninety days after the approval of this law,
file with the secretary of said board a
written statement, setting forth his name,
residence and the length of time during
which and the place where he has practiced
such occupation, and shall pay to the
treasurer of said board \$2.00; and a cer-
tificate of registration entitling him to
practice the said occupation for the fiscal
year ending January 31, 1922, thereupon
shall be issued to him, and the holders of such
certificates shall, annually, on or before
the expiration of their respective certifi-
cates, make application for the renewal of
same, stating the number of his expiring
certificate, and shall in each case pay to
the treasurer of said board the sum of \$2.00
therefor. For any and every license or

certificate given or issued by the board a fee of \$2.00 shall be paid by the person receiving the same. Should any person holding a certificate of registration as a barber fail to make application for renewal of same within the time prescribed herein, such person shall be required to pay the sum of \$5.00 to the treasurer of said board, in addition to the regular registration fee provided for herein. Any person failing to renew his certificate of registration for a period not exceeding two years may reinstate said certificate of registration upon the payment of \$2.00 for each delinquent year in addition to the \$5.00 reinstatement fee prescribed herein, but, any barber failing to renew his certificate of registration for a period exceeding two years and desiring to be re-registered as a barber in this state will be required to appear before said board and pass a satisfactory examination as to his qualifications to practice said occupation and shall pay to the treasurer of said board the regular examination fee as is prescribed in the following section."

We think the suggestion is splendid that a waiver of such penalty be enforced by the State Board of Barber Examiners for those in the armed forces, however, neither the Governor, the State Attorney General, the State Board of Barber Examiners, nor any other officer or board except the State Legislature has any authority to cause such a waiver to become effective. The above provision provides in part:

"* * * such person shall be required to pay the sum of \$5.00 to the treasurer of said board * * *" (Underscoring ours)

By the use of the word "shall" it is mandatory. See State ex. rel. Stevens v. Wurdeman, 295 Mo. 566.

It is a well established principle of law that any board, bureau or commission, being a creature of statute, shall have only such powers as may be conferred upon said board, bureau or commission by statute. In Aetna Insurance Company v. O'Malley, 124 S. W. (2d) 1164, 1. c. 1166, the court said:

"* * * 59 C.J., section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law * * * *'"

This function you inquire about being waived is a mandate from the Legislature and must be carried out to the letter of the law, as stated in *State v. Welsch*, 124 S. W. (2d) 1. c. 639:

"(3-5) It is established law that the purpose of mandamus is to compel the performance of a ministerial duty which one charged with its performance has refused to perform. While mandamus will not lie to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his official duties, it is nevertheless well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *State ex rel. Jones et al. v. Cook*, 174 Mo. 100, 118, 119, 120, 73 S.W. 489."

Likewise, this is merely a ministerial act to be performed by the State Board of Barber Examiners and it leaves no discretion whatever to the Board but to comply with the said act.

The only possible way that the writer can suggest such can become effective is that a bill be passed by the next General Assembly effectuating such waiver. This is a matter within their sole discretion, and one that we heartily approve and think should be passed.

In some instances laws have been passed tolling certain provisions of the law for the duration of the war so as to not

November 18, 1943

penalize those members of our armed forces while serving their country. For instance, I find one example. This particular law, Section 16, p. 663, Laws of Missouri, 1941, provides that any time within one year after the act became effective, upon the payment of a fee amounting to \$25.00, persons having certain stipulated qualifications may be issued a certificate of registration as an architect or engineer without being required to take an oral or written examination. The amendment passed by the Sixty-second General Assembly, and approved on August 2, 1943, merely added the following provision thereto:

"* * * Provided, however, that any architect or professional engineer who has been prevented from obtaining such certificate of registration within the period of one year after the effective date of this act, because of service with the armed forces during such period, shall have one year after the official termination of the war to obtain such certificate, without oral or written examination."

Just such a similar provision could be passed by the General Assembly and thereby waive any such fees, but in the absence of some law amending or repealing the present law requiring the penalty, the Board is forced to comply with same and collect the \$5.00 fee.

CONCLUSION

Therefore, we must hold that it is mandatory upon the State Board of Barber Examiners to require a penalty of \$5.00, as provided in Section 10132, supra, regardless of whom the penalty may be assessed against, be he a civilian or a member of the armed forces of this country.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTICK
Attorney General

ARH:NH

- CIRCUIT CLERKS: (1) Circuit Clerk of St. Louis County not entitled to fees in addition to his salary set by Section 13528, R. S. 1939.
- (2) Circuit Clerks are entitled to retain fee for bar enrollment as provided by Supreme Court Rules.

January 21, 1943.



Mr. Raymond O. Douglas
Clerk Circuit Court
St. Louis County
Clayton, Missouri

Dear Mr. Douglas:

The Attorney-General wishes to acknowledge receipt of your letter of January 11, 1943, requesting an opinion of this Department. Your letter requesting such opinion, after omitting caption and signature, is as follows:

"I would like to have an opinion from the General's Office relating to the following R. S. Missouri 1939, Section #13408, 'Provided further that the Clerks of the Circuit Court shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venues from other counties.' This law is known as the Circuit Clerk's salary bill since the passage of this bill in the 1937 session of Legislature, under which I have operated until the first Monday of January, 1943, when I began my new term of office.

"According to laws of Missouri 1939 being titled 'Salaries and fees fixing salaries of county officers in counties of 200 to 400,000 inhabitants' under which I am classified, according to section one my salary is set out. I would like you to give me an opinion as to whether or not I am entitled to these change of venue fees as provided under the Act of 1937."

"There is also the question according to Supreme Court Rule, which I believe is number 37, section 1, that the Clerk of the Circuit Court shall retain ten cents for each enrollment fee collected by him. I would like to know whether to retain these fees further, or pay them into the General Revenue fund of the county."

Your request seems to be upon two questions: First, as to whether or not under the present law relative to circuit clerks, the Circuit Clerk of St. Louis County has the right and privilege to retain all fees earned by him in cases of change of venue from other counties; Second, as to whether or not the circuit clerks have the authority to retain the fee of ten cents on each bar enrollment fee paid in their respective circuits.

I.

Taking up question number one, we will first cite you to Section 13408, R. S. Mo. 1939, which is the old statute which governed the salary and fees of the circuit clerks of the State of Missouri, and providing as follows:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum: In counties having a population of less than seven thousand five hundred persons, the sum of twelve hundred (\$1200) dollars; in counties having a population of seven thousand five hundred persons and less than ten thousand persons, the sum of fifteen hundred (\$1500) dollars; in counties having a population of ten thousand persons and less than fifteen thousand persons, the sum of seventeen hundred (\$1700) dollars; in counties having a population of fifteen thousand persons

and less than seventeen thousand five hundred persons, the sum of nineteen hundred (\$1900) dollars; in counties having a population of seventeen thousand five hundred persons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; in counties having a population of twenty thousand persons and less than twenty-five thousand persons, the sum of twenty-three hundred (\$2300) dollars; in counties having a population of twenty-five thousand persons and less than fifty thousand persons, the sum of twenty-five hundred (\$2500) dollars; in counties having a population of fifty thousand persons and less than seventy-five thousand persons, the sum of thirty-six hundred (\$3600) dollars; in counties having a population of seventy-five thousand persons and less than one hundred fifty thousand persons, the sum of four thousand (\$4000) dollars; in counties having a population of one hundred fifty thousand persons and less than four hundred thousand persons, the sum of five thousand (\$5000) dollars; Provided, that in any county wherein the clerk of the circuit court is ex officio recorder of deeds, said offices shall be considered as one for the purpose of this section: Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio

recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided: Provided further, that the clerks of the circuit courts shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venue from other counties: Provided further, that until the expiration of their present term of office, the persons holding the office of circuit clerk shall be paid the maximum amount as now provided by law, in the manner provided by this chapter."

However, in 1939 a new statute was passed which governed circuit clerks and other officers in counties which contained two hundred to four hundred thousand inhabitants. The section setting forth the salary of the circuit clerks and other officers in such counties, is Section 13528, R. S. Mo. 1939. This section reads as follows:

"In all counties in this state which now have or may hereafter have a population of not less than 200,000 inhabitants and less than 400,000 inhabitants according to the last Federal decennial census, the following salaries shall be paid the hereinafter named officers, beginning with the term of office following the term for which the incumbent has been elected, or is serving at the time of the effective date of this article, to-wit: Clerk of the county court,

\$6750.00 per annum; collector of revenue, \$8750.00 per annum; county treasurer, \$6750.00 per annum; recorder of deeds, \$6750.00 per annum; circuit clerk, \$6750.00 per annum; sheriff, \$8750.00 per annum; coroner, \$5000.00 per annum; assessor, \$8750.00 per annum."

The question then arises as to whether or not the circuit clerks of such counties are authorized by statute to receive additional compensation in the form of fees which they might collect, and which in the instant request are the fees derived from the changes of venue from other counties. In answer to this particular question we wish to cite you to Section 13537, R. S. Mo. 1939, which reads as follows:

"All the salaries mentioned in section 13528 shall be in full of all services rendered by virtue of said officers and said annual salaries shall be paid in equal monthly installments out of the county treasury of said county. None of the officers or their employees hereinabove enumerated shall retain any fees, fines, costs, commissions, penalties or charges collected by virtue of their office under the laws of this state but all the fees, fines, costs, commissions, penalties or charges shall be paid into the county treasury and they shall be the property of said county. The county court of said counties shall determine by proper order when the fees, fines, costs, commissions, penalties or charges so collected by said officers shall be paid and turned over to the county treasury and how to be accounted for, and the county court shall require a sworn statement by said county officer or officers showing the items collected in detail, their source, character and the aggregate amount thereof, and shall require a copy of said sworn statement to be filed in the office of the comptroller of said county."

As can be seen from a study of this statute, the circuit clerks or other officers mentioned in Section 13528, supra, are forbidden to retain any fees, fines, costs, commissions, penalties or charges collected by virtue of their office under the laws of this State. Consequently, under the provisions of such section the Circuit Clerk of St. Louis County is not authorized to retain the fees which might come into his possession through changes of venue sent to his county from other counties.

In order that there might not be any conflict between former provisions and the provisions which have been cited above, Section 13538, R. S. Mo. 1939, provides as follows:

"All laws, or parts of laws inconsistent or in conflict with any provisions of this article are hereby repealed."

Conclusion.

Therefore, it is the opinion of this Department that Section 13408, R. S. Mo. 1939, does not apply to the circuit clerk's office of St. Louis County but that Sections 13528, 13537 and 13538, R. S. Mo. 1939, apply to such office and under such provisions the Circuit Clerk of St. Louis County is not authorized to retain any fees which might come into his possession due to changes of venue from other counties, and that such fees, if any, shall be paid into the county treasurer of St. Louis County.

II.

Question number two is whether the circuit clerks have authority to retain ten cents on each bar enrollment fee which is paid to their office under the provisions of Section 4 of Rule 37 of the Supreme Court of Missouri. Such section of Rule 37 provides as follows:

"All enrollment fees and penalties paid to the Circuit Clerks shall be forwarded to the Clerk of the Supreme Court on or before the 5th day of the month after that in which they were collected, together with a statement showing by whom each fee and penalty were paid."

"As compensation to the Clerks of the said Circuit Courts, at the time of remitting said Clerk may retain ten cents out of each annual enrollment fee. The Clerk of the Supreme Court shall file and preserve said statements and shall keep enrollment fees and penalties in a separate fund to be known as the 'Bar Fund' and to be paid out as hereinafter provided."

This rule, along with other rules, is promulgated by the Supreme Court of Missouri and does not amount to a law or statute of such State. However, they are a set of rules under which the Supreme Court is governed and also under which the practicing attorneys of this State must proceed.

The law relative to the salaries of the different county officers provides that where a definite salary is set by statute that the officers do not have authority to collect additional compensation. This rule of law was set out in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 344 Mo. 795. However, the duty placed upon the clerks by the Supreme Court rule aforesaid is not a duty placed upon him by statute but seems to be an additional duty set by the Supreme Court of this State. By the law as set out in *Smith v. Pettis County*, 136 S. W. (2d) 282, 345 Mo. 339, we feel that the Circuit Clerks of this State are entitled to retain the ten cents on each annual bar enrollment fee as set out in Section 4 of Rule 37 of the Rules of the Supreme Court of Missouri.

Conclusion.

Therefore, it is the opinion of this Department that in view of the fact that the duty placed upon the circuit

Mr. Raymond O. Douglas

-8-

Jan. 21, 1943

clerks of this State by Section 4 of Rule 37 of the Supreme Court is an additional duty to those placed upon such officers by the statutes of this State, that the circuit clerks are authorized to retain ten cents of each bar enrollment fee as provided in such Supreme Court Rule.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

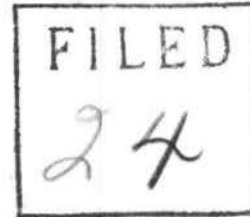
JSP:EG

GOVERNOR: EXTRADITION: Present rendition warrant
issued by the Governor is valid.

February 17, 1943

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

3-2



Dear Sir:

Your request for an opinion, dated February 15, 1943, in reference to a letter from Charles S. Frazier, Assistant Circuit Attorney of the city of St. Louis, concerning your rendition warrant, has been received.

Included in this request is a copy of a rendition warrant issued by you on the 22nd day of January, 1943, upon the demand of the Governor of the State of Illinois, for Ike Finkelstein, as a fugitive from justice. The charge contained in the rendition warrant is arson, and the messenger named is Frank T. Kern. An identical form of this warrant will be hereinafter set out in a quotation cited in an opinion by the Supreme Court of this State.

A particular paragraph in the letter from Charles S. Frazier, stating the facts to you, is as follows:

"The Hon. William L. Mason, Judge of the Circuit Court of St. Louis, division No. 10, in whose court the writ of habeas corpus was filed, pointed out to me that the rendition warrant is void on its face in that it does not state that the copy of the indictment found is certified to be authentic by the Governor of Illinois, in compliance with U. S. Rev. Stat. sec. 5278 (18 U. S. C. A., sec. 662). I do not agree with Judge Mason on this point. I think the language employed in the warrant follows the Federal Statute and is sufficient. I am writing you however

Honorable Forrest C. Donnell -2- February 17, 1943

and am enclosing a copy of that part of the Federal Statute referred to and a copy of the rendition warrant together with the suggested change, for the reason that if the lawyers in St. Louis find out that Judge Mason considers your rendition warrant void on its face, all of them will file their writs before him and it will be difficult to return fugitives to the various demanding states."

Section 662, Title 18, U. S. C. A., reads as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to

Honorable Forrest C. Donnell -3- February 17, 1943

cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

This section also appears in Volume 2, page 3988 R. S. Missouri, 1939. It will be noticed that this section specifically says:

" * * * certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, * * * * * ."

In reading the entire section, we find that the above partial quotation does not apply to the certification of the indictment or affidavit made before the magistrate, but refers to the words, "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice." In other words, the demand which you receive, and which is not a part of the warrant is usually authenticated by the Governor of the demanding State. However, we are citing cases which hold to the effect that a warrant issued by you is prima facie valid and it takes necessary evidence to

declare it invalid.

Extradition as between states is governed by the federal constitution, federal statutes and federal decisions. It was so held by the Supreme Court of this State in the case of Keeton v. Gaiser et al, 55 S. W. (2d) 302, par. 1, where the court said:

"The extradition of fugitives from justice as between the several states is governed by the Constitution and statutes of the United States, and federal decisions are controlling. Section 2 of article 4 of the United States Constitution provides 'a person charged in any state with treason, felony, or other crime' shall, on demand of the executive authority thereof, be delivered up by any other state to which he has fled. Section 5278, R. S. U. S. (18 USCA Sec. 662) makes it the duty of the executive authority of the asylum state to cause the fugitive to be arrested and held for extradition on demand of the executive authority of the requisitioning state and production of a copy of an indictment found or affidavit filed before a magistrate therein, charging him with treason, felony, or other crime, certified as the statute requires. Our own statutes, sections 1458 and 3591, R. S. Mo. 1929 (Mo. St. Ann. Secs. 1458, 3591), conform to these federal requirements as needs they must."

Section 3591 mentioned in the above quotation is now Section 3980 R. S. Missouri, 1939.

Honorable Forrest C. Donnell -5- February 17, 1943

Also, in the case of United States ex rel McCline v. Meyering, Sheriff, 75 F. (2d) 716, par. 1, the Circuit Court of Appeals, Seventh District said:

"Extradition proceedings are not creatures of state law, but are controlled by the Constitution of the United States, article 4, sec. 2, and by sections 5278, 5279, of the Revised Statutes (18 USCA Secs. 662, 663), passed thereunder. * *"

In the case of Collins et al v. Traeger, Sheriff, 27 F (2d) 842, l. c. 844, the Circuit Court of Appeals of the Ninth Circuit, in holding that a warrant which did not even state that the fugitive was a fugitive from justice is presumed to be valid until overthrown by contrary proof, said:

"Appellant contends that the warrant is void upon its face for want of a recital that the affidavit or verified complaint was made before a magistrate. There is nothing in the statutes prescribing the form or contents of the warrant, and the decided cases exhibit great diversity. For this jurisdiction, however, we think the rule established that such a warrant is aided by the presumption of official regularity, and under that presumption the warrant here is prima facie valid. Where there is no indictment, an essential condition precedent to the exercise of the power to extradite is an

'affidavit made before a magistrate' of the demanding state. But equally essential is it that the person demanded be a 'fugitive from justice,' and in *Munsey v. Clough*, 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515, it is said:

"The issuing of the warrant by him (Governor of the asylum state), with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the removal, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the Governor. * * * * *

Also, in the case of *Black v. Miller et al*, 59 F. (2d) 687, 1. c. 690, the Circuit Court of Appeals, Ninth District, said:

"The record here shows that the accused is in custody under an extradition warrant issued by the Governor of Washington, a warrant which appears upon its face to be warranted by the Constitution and laws of the United States. After a careful consideration of all the evidence we do not find that the petitioner herein has overcome the prima facie case thus made by the warrant."

Honorable Forrest C. Donnell -7- February 17, 1943

Also, the United States Court of Appeals for the District of Columbia, in the case of Lee Won Sing v. Cottone, 123 F. (2d) 169, 1. c. 172, said:

"Whether or not a person is, within this definition, a fugitive from justice is a question of fact. And in a habeas corpus proceeding questioning the legality of detention for extradition the fact alone that a rendition warrant has been issued by the governor of the asylum state makes a prima facie case of fugitivity, which unless overthrown by the alleged fugitive by clear and conclusive proof, will, so far as the question of fugitivity is concerned, sustain detention. * *" (Underscoring ours.)

The Supreme Court of this State in passing upon a warrant identical with the warrant which has been attacked in St. Louis, in the case of Ex parte Davis, 62 S. W. (2d) 1086, 1. c. 1088, said:

"The third assignment made is that the rendition warrant issued by the Governor of this state fails affirmatively to show on its face a recital of the facts necessary to its issuance. The warrant is as follows:

"'State of Missouri

"'To the Sheriff or Marshal of any County or City in this State.

"Whereas, the Governor of the State of Wisconsin has demanded of the Governor of this State, William Charles Davis fugitive from justice from said State; and Whereas, the Governor of Wisconsin has produced to me a copy of an affidavit in said State certified to be authentic, charging said fugitive with having committed the crime of forgery and uttering,

"Now, Therefore, I, Guy B. Park, Governor of the State of Missouri, do hereby command you to arrest the said William Charles Davis anywhere within the limits of this State, and him secure and deliver to Walter English who is the agent of said State of Wisconsin duly authorized to receive the said fugitive.

"And I do hereby command all Sheriffs, Marshals, Constables and Police Officers to whom this warrant may be shown to aid and assist in the execution of this process. And you will make due return to me on this warrant of your proceeding thereunder.

"In testimony whereof, etc.

"The case on which the petitioner relies is In re Hagan, 295 Mo. 435, 245 S. W. 336. And the first point made is that the rendition warrant merely recites the Governor of Wisconsin 'has demanded of the Governor

of this State William Charles Davis, fugitive from justice from said State,' instead of saying Davis was demanded as a fugitive from justice. In short, the objection is that the word 'as' is omitted after the name of the petitioner and before the word 'fugitive.' The Hagan decision does generally hold a recital of every jurisdictional fact necessary to the issuance of a rendition warrant must appear on its face. But we do not understand the case to go as far as petitioner contends. The warrant there considered omitted the word 'as,' and the opinion says (295 Mo. loc. cit. 446, 245 S. W. 336, loc. cit. 339): 'it is doubtful as to whether or not it recites that petitioner is a "fugitive from justice" from Kansas.' But there was no square holding on this, or that the warrant was bad because it failed to recite the accused was demanded as a fugitive. If the case had so held, we would be compelled to disagree with it. Where a requisition demands D, a fugitive from justice, the latter words are descriptive and mean D is demanded as a fugitive, or because he is a fugitive. The whole context of the requisition so shows. Furthermore it has been held by the United States Supreme Court the warrant is presumptively good 'with or without a recital therein that the person demanded is a fugitive from justice.' *Munsey v. Clough*, 196 U. S. 364, 372, 25 S. Ct. 282, 284, 49 L. Ed. 515."

Honorable Forrest C. Donnell -10- February 17, 1943

And, in the same case, at l. c. 1090, the court said:

"In view of these authorities, especially the federal decisions, we are constrained to hold the rendition warrant in the instant case was valid, or at least prima facie valid. It therefore results that the prisoner must be remanded to the custody of the respondent."

However, since Section 662, Title 18, U. S. C. A., may be considered ambiguous, we suggest that the words, "by him", as suggested by Judge Mason of the Circuit Court of the city of St. Louis, be inserted in the seventh line of the body of the warrant, between the words, "in said State certified," and the words, "to be authentic." We suggest this for the reason that under the holding of Judge Mason, it would be necessary for you to surrender the original papers on a subpoena, whenever a habeas corpus proceeding is brought in that court. The warrant's validity is not questioned but it would only be necessary to insert the words, "by him" with a pen, and if any other warrants are printed, the words should be inserted in the new warrants.

CONCLUSION

It is the opinion of this department, that your rendition warrant, as printed, is valid, but could be subject to attack, which attack would be unsuccessful.

APPROVED:

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

APPROPRIATION:

How amounts expended under six-month-bill
is to be charged against biennium bill.

BUDGET ALLOTMENT:

July 22, 1943

Honorable Forrest C. Donnell,
Governor of the State of Missouri
Jefferson City, Missouri



Dear Sir:

Your letter of July 21, 1943 is as follows:

"The General Assembly, in Senate Committee Substitute for House Bill No. 4, made, for State Hospital No. 1 for the first and second quarters of the present biennium, a combined appropriation for Additions, Repairs and Replacements. Said Hospital has been allotted the money appropriated in the appropriation so made by Senate Committee Substitute for House Bill No. 4. House Bill No. 409, in which bill the biennial appropriation was made, sets forth, for said Hospital, a specific amount for Additions and a specific amount for Repairs and Replacement.

"A like condition exists with respect to various departments, and I desire your below requested opinion as a guide in connection with the preparation of allotment sheets for various departments.

"I request your opinion on the question: 'What part of the money so allotted should be charged against the biennial appropriation for Additions and what part of said money should be charged against the biennial appropriation for Repairs and Replacements?'"

This question arises out of the difference between the division of appropriated funds as made in Senate Committee Substitute for House Bill No. 4 and House Bill No. 409. Section 1 of Senate Committee Substitute for House Bill No. 4 provides, in part, as follows:

"To pay salaries, wages and per diem of the officers and employees. There is hereby appropriated out of the State Treasury, chargeable to the funds herein

July 22, 1943.

designated, the various amounts set out to pay the salaries, wages and per diem of the officers and employees and other expense of * * * * State Hospital No. 1, * * * * for the period beginning January 1, 1943, and ending June 30, 1943, as follows:

* * * * *

"For Hospital No. 1--

Payable out of General Revenue Fund, as follows:

* * * * *

"B. and C. Additions, Repairs and Replacements. 1,000.00"

Section 1 of House Bill No. 409 provides, in part, as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the funds herein designated, the various amounts set out to pay the salaries, wages and per diem of the officers and employees and other expense of * * * * State Hospital No. 1, * * * * for the years 1943 and 1944, as follows:

* * * * *

"For Hospital No. 1.

Payable out of General Revenue Fund, as follows:

* * * * *

"B. Additions:

Furniture, office and building equipment, operative equipment, livestock, labor and materials for construction and installation thereof. 10,000.00

"C. Repairs and Replacements:

Labor, material and supplies for repairing buildings, building equipment, furniture, office and operative equipment and structures other than buildings. \$15,000.00"

It is to be noted that House Bill No. 4 covers a period beginning January 1, 1943 and ending June 30, 1943 while House Bill No. 409 covers the years of 1943 and 1944. That duplication, however, is taken into account by Section 10 of House Bill No. 409

July 22, 1943.

which is as follows:

"All expenditures made under the provisions of Senate Committee Substitute for House Bill No. 4, as passed by the 62nd General Assembly, shall be charged against the appropriations set out in this Act, and in no case shall the expenditures in Senate Committee Substitute for House Bill No. 4, as passed by the 62nd General Assembly and the expenditures authorized under the provisions of this Act exceed the total amount of the items as set out in this Act."

The question presented involves construction and application of Section 10, supra. The difficulty arises due to the fact that House Bill No. 4 carried the item "Additions, Repairs and Replacements. . . . \$1,000.00" all together, while House Bill No. 409 separates the items into "Additions. . . . \$10,000.00" and "Repairs and Replacements. . . . \$15,000.00". Thus, in compliance with Section 10, must the \$1,000.00 appropriated for Additions, Repairs and Replacements in House Bill No. 4 be subtracted from the \$10,000.00 for Additions or the \$15,000.00 for Repairs and Replacements as provided in House Bill No. 409, or is a portion of the \$1,000.00 to be subtracted from each, and if so, what portion? Or must the amounts expended from the \$1,000.00 for Additions, Repairs and Replacements provided for in House Bill No. 4 be charged to the \$10,000.00 for Additions or the \$15,000.00 for Repairs and Replacements as provided in House Bill No. 409, or is a portion of the amount that has been expended from the \$1,000.00 to be charged to each, and if so, what portion?

There seems to be two methods which suggest themselves. The first, which would be applicable to the first question we have formulated, is that the \$1,000.00 provided in House Bill No. 4 for Additions, Repairs and Replacements be divided between the items "B. Additions. . . . \$10,000.00" and "C. Repairs and Replacements. . . . \$15,000.00" in the same ratio that the sums of \$10,000.00 and \$15,000.00 are to \$25,000.00, said sum being the total figure authorized in House Bill No. 409 for Additions and Repairs and Replacements. This method would require a subtraction of \$400.00 from the \$10,000.00 provided for Additions, and \$600.00 from the \$15,000.00 provided for Repairs and Replacements. The second method, applicable to the second question stated, is that the \$1,000.00 provided in House Bill No. 4 for Additions, Repairs and Replacements be divided between the items "B. Additions. . . . \$10,000.00" and "C. Repairs and Replacements. . . . \$15,000.00" on the basis that it was actually expended. That is, if \$950.00 was spent for Additions and \$50.00 was spent for Repairs and Replacements, then those amounts must be charged to their proper

item in House Bill No. 409. We think the following discussion clearly demonstrates which of the foregoing methods is correct and which is incorrect.

An appropriation act is an authorization by the General Assembly to the agency to spend during a specified period a sum not in excess of the amount fixed (Sec. 19, Art. 10 Mo. Const.; See also concluding clause of Sec. 10, supra). In other words, House Bill No. 409 authorizes State Hospital No. 1 to spend during the years 1943 and 1944, for the item "Additions", a sum not in excess of \$10,000.00, and for the item "Repairs and Replacements" a sum not in excess of \$15,000.00. Now, let us assume that all of the \$1,000.00 as provided in House Bill No. 4 has been expended in the purchase of additions and that none has been expended for repairs and replacements, but that we divide the \$1,000.00 on the basis of 40 per cent or \$400.00 to Additions and 60 per cent or \$600.00 to Repairs and Replacements. On the basis of such division, it would be said that there remains \$9,600.00 yet to spend in Additions and \$14,400.00 yet to spend in Repairs and Replacements. Further assume that during the balance of the current biennium Hospital No. 1 spends the remaining \$9,600.00 for Additions. At the end of the biennium it then appears that while the General Assembly has said to the Hospital authorities you may spend \$10,000.00 for Additions in the years 1943 and 1944, there has been spent for Additions during said period the sum of \$10,600.00.

We think this discussion clearly demonstrated the fallacy of the first method, since it is not to be controverted that an agency of the state cannot spend more for "Additions" during a biennium than has been appropriated for said purpose. This factor must be kept in mind in ascertaining the meaning of Section 10, supra, and would control if said section was ambiguous. However, we think it is very clear in requiring that the "expenditures" made out of the funds appropriated in House Bill No. 4 be charged against the amounts appropriated in House Bill No. 409. We stress that it does not require the amount "appropriated" in House Bill No. 4 to be deducted from the amount appropriated in House Bill No. 409. Thus the nature of the expenditure, that is, whether it was for an Addition or for a Repair and Replacement, would govern to determine where the charge is to be made against the sums provided in House Bill No. 409.

In our opinion, the second method outlined is the only one which may legally be used since only by basing the charges to be made against House Bill No. 409 on the actual nature of the expenditure made under House Bill No. 4, can we confine the agency within the total authorization fixed in House Bill No. 409 for the objects specified.

July 22, 1943.

This conclusion will require knowledge of the amounts expended, and of the obligations outstanding against the sums appropriated in House Bill No. 4 for Additions, Repairs and Replacements, and the nature of each, before it can be ascertained how much of the \$10,000.00 for Additions and of the \$15,000.00 for Repairs and Replacements provided in House Bill No. 409 is available for allotment.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:jn

TAXATION:

procedure for collectors in selling lands for delinquent taxes after the same have been offered at the third sale and no bid has been received therefor.

July 29, 1943

Hon. P. F. Donehue
Collector of Revenue
Linn, Missouri

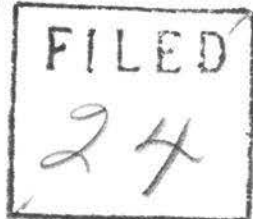
Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

"In cases where real estate is five years delinquent and then have been offered for sale three consecutive times, each time no bid made, what would be the proper procedure to follow?"

I think your question is answered by the following provisions of Section 11130, R. S. Mo. 1939:

"* * * If any lands or lots are sold at such third offering, then the Collector, in his discretion, need not again advertise or offer such lands or lots for sale oftener than once every five years after the third offering of such lands or lots, and such offering shall toll the operation of any applicable statute of limitations. A purchaser at any sale subsequent to the third offering of any land or lots shall be entitled to the immediate issuance and delivery of a collector's deed and there shall be no period of redemption from such sales: Provided, however, before any purchaser at a sale to which this section is applicable shall be entitled to a collector's deed it shall be the duty of the collector to demand, and the purchaser to pay, in addition to



July 29, 1943

his bid, all taxes due and unpaid on such lands or lots that became due and payable on such lands or lots subsequent to the date of the taxes included in such advertisement and sale. In the event the real purchaser at any sale to which this section is applicable shall be the owner of the lands or lots purchased, or shall be obligated to pay the taxes for the non-payment of which such lands or lots were sold, then no collector's deed shall issue to such purchaser, or to anyone acting for or on behalf of such purchaser, without payment to the collector of such additional amount as will discharge in full all delinquent taxes, penalty, interest and costs."

Since the collector can only follow the provisions of the statute in the collection of taxes, he would not be authorized to strike off lands which have been offered for three years and start with the first sale thereafter and proceed again to sell the lands for later taxes.

CONCLUSION.

From the foregoing statute, it is the opinion of this Department that in cases where lands are not sold at the third sale that the Collector should follow the foregoing provisions of the statute and that the statute of limitations will be tolled providing the Collector offers such lands at least once in each five years after the third offering of the lands for taxes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:PD

TAXATION:
ESTATES:

Executors or administrators of estates are liable for taxes against estates if they do not pay same out of the assets of estate and if taxes are assessed against the estate, the executor, administrator and their sureties are liable under the bond of such taxes.

August 3, 1943



Hon. P. F. Donehue
Collector of Revenue
Linn, Missouri

Dear Sir:

This is in reply to yours of recent date on the question of the liability of executors, administrators and estates for personal taxes assessed against properties of estates while in the process of administration; the procedure for the enforcement for the payment of such tax, and the procedure for the County Collector and County Court to follow in settlements relating to delinquent taxes. On the question of the assessment of personal property taxes on property belonging to estates, we are enclosing copy of opinion dated July 17, 1936 to Mr. Wilcox, Chairman of the State Tax Commission. I think this opinion will answer your inquiry as to the procedure for taxing of such estates and the duty of the representative of the estate in relation to the payment of such taxes. We are also enclosing copy of an opinion dated May 14, 1943 to Mr. Ramey Smith, Clerk of the County Court at Ava, Missouri. I think this opinion will answer your inquiry as to the procedure which the County Court takes in settling with the Collector for delinquents which he reports for credit.

In answering your other questions, we are assuming that the assessments were duly made against either the estate or the executor or administrator of the estate. We note from the letter accompanying your request that a party who has been an executor of the estate has taken the position that the personal tax against the properties of the estate which he was administering would have been paid if the bill for the taxes had been presented and allowed. We call your attention to subsection III of Section 181, R. S. Mo. 1939 which reads as follows:

"All debts, including taxes due the state or any county or incorporated city or town; and it shall be the

duty of the executor or administrator to pay all such taxes without any demand therefor being presented to the court for allowance: Provided, that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except where he is in possession of the realty under an order of the court."

From this statute, you will see that no demand or allowance for personal taxes against the estate is necessary. It is the duty of the representative of the estate to see that all taxes have been paid before he makes a final settlement. In the case of *State ex rel. and to the use of Rudder, Revenue Collector, v. Haphe et al*, 31 S. W. (2d) 788, 791, Division 1 of the Supreme Court, in discussing this question, held:

"In passing, it may be added that the estate of a decedent is not fully administered, and consequently there can be no valid final settlement of the administrator, unless and until all demands growing out of the assessment of taxes against the estate have been paid, or their payment provided for. See, *State ex rel. v. Holtcamp*, 266 Mo. 347, 181 S. W. 1007, and *Wyatt v. Stillman Institute*, 303 Mo. 94, 106, 260 S. W. 73. These cases in effect overrule the earlier case of *State ex rel. v. Kenrick*, 159 Mo. 631, 60 S. W. 1063 and cases following it."

In Vol. 24 C. J., page 325 at sections 945 and 946, we find the principle with respect to general demands and taxes against estates to be stated as follows:

"It is usually considered that a claim due to a state must be presented, al-

August 3, 1943

though this has been denied, and it is sometimes expressly required by statute that debts due to the state be paid without presentation to the probate court for allowance. A claim for a debt due to a county must be presented.

"The more general view is that the requirement of presentation does not apply to claims for taxes and assessments, whether assessed before or after the death of decedent, although there is also support for the view that a presentation of such a claim is necessary.

"* * * * *

Our Supreme Court in the case of State ex rel. Ziegenhein, Collector, v. Tittmann, 103 Mo. 553 held that it was the duty of the administrator to pay taxes without them being presented for allowance. At l.c. 564 the court said:

"* * * * * Indeed, the universal opinion has prevailed, that it was their duty to pay these taxes as well as those that accrued prior to administration, and such has been the ruling of this court in Williams, Adm'r, v. Heirs of Petticrew, 62 Mo. 460, loc. cit. 469. In that case taxes paid by the administrator were held to be properly paid, when it appeared that they not only accrued after administration, but were paid after the final settlement was filed. * * * "

Missouri statutes do not require the Collector to make a demand on the taxpayer for his taxes. The taxpayer is charged with notice of the taxes and it is his duty to pay the same without demand. The Collector is not required to

file a demand in the probate court for the taxes. In the case of *State ex rel. v. Haphe*, supra, 31 S. W. (2d) 788, 790, the court in speaking of the liability of an administrator, executor or their sureties for personal taxes said:

"Turning next to the Administration Act, section 181 (Rev. St. 1919) provides:
'All demands against the estate of any deceased person shall be divided into the following classes: * * *

"IIII. All debts, including taxes due the state or any county or incorporated city or town; and it shall be the duty of the * * * administrator to pay all such taxes without any demand therefor being presented to the court for allowance.'

"The taxes referred to in this section include personal taxes assessed against the estate during its administration as well as those assessed against the decedent in his lifetime. *State ex rel. v. Tittmann*, 103 Mo. 553, 15 S. W. 936. But it is clear, on the grounds set forth in the preceding paragraph, that taxes accruing after the death of the decedent are not debts or demands against the estate unless they have been assessed against it. Both the person 'owning' and the person 'holding' personal property are liable for taxes thereon, and such taxes may be assessed against either or both. But with respect to each they do not become a debt unless and until they are duly assessed against him in the manner prescribed by law. If such taxes are assessed against an estate while in the course of administration, they immediately become demands against the estate, and it is the duty of the administrator to pay them without

demand or presentation for allowance. And there can be no question but that an administrator who, having in his hands sufficient funds to pay such a demand, distributes the assets of the estate without making payment, fails to 'perform all * * * things touching said administration required by law.' For such a breach of duty the administrator and his surety would be personally liable. See, State ex rel. v. Packard, 250 Mo. 686, 157 S. W. 598."

From this statement it will be seen that if the taxes are assessed against the estate while in the course of administration it is the duty of the administrator to pay such taxes without demand or presentation, and if he fails to pay the same he incurs a liability on his bond. In such case, the County Collector would be authorized and required to bring an action on the Collector's bond for the unpaid taxes, penalty and interest.

CONCLUSION.

From the foregoing, it is the opinion of this Department that executors or administrators are responsible for the payment of taxes against the estates which they are administering upon, and if the taxes are assessed against the estate, they have a liability under their bond for the payment of the bond. If the taxes are assessed against the executor or administrator personally, then they have a personal liability to pay the taxes.

We are further of the opinion that it is not the duty of the collector to file personal tax bills in the probate court for allowance and demand; that it is the duty of the executor or administrator to pay such taxes without a demand or an order of allowance.

We are further of the opinion that if a final settlement has been filed in an estate and there are taxes outstanding

August 3, 1943

that it is the duty of the collector, through his personal tax attorney, to institute suit for the collection of the tax against the executor or administrator individually, and if the tax is assessed against the estate, then the suit for collection of such tax should be brought against the executor or administrator and his bondsmen.

We are further of the opinion that the County Court would not be authorized under the law to give the Collector credit for such delinquent taxes until he has followed the foregoing procedure for the collection of such taxes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWE:PD
encls.

COUNTY : Qualifications for County Super-
SUPERINTENDENT : intendent of Public Schools under
OF PUBLIC : Section 10609, R. S. Mo. 1939, shall
SCHOOLS : be at least twenty-four years of age,
: a citizen of the county from which he
: is appointed, hold a state certificate
: authorizing him to teach in the
: public schools of Missouri.

November 16, 1943



Honorable Forrest C. Donnell
Governor, State of Missouri
Jefferson City, Missouri

Your Excellency:

This office is in receipt of your letter,
which omitting caption and signature, reads as
follows:

"Your opinion, as soon as possible, is
respectfully requested on the following ques-
tion:

"Is a person who is at least twenty-four
years old, a citizen of the county and
who holds a state certificate, author-
izing him to teach in the public schools
of Missouri, qualified to be appointed
county superintendent of public schools
of said County?"

That portion of the statutes which is devoted
to the qualifications of county school superintendents
is section 10609, R. S. Mo. 1939. The portion useful
to us in determining the question raised in your letter
reads as follows:

****said county school superintendent shall be
at least twenty-four years old, a citizen of the
county,

1. shall have taught or supervised
schools as his chief work during
at least two years of the eight years
next preceding his election or appoint-
ment;

2. or shall have spent the two years next
preceding his election or appointment
as a regular student in a state teachers'
college or university, and shall at the time

Nov. 16, 1943

of his election hold a diploma from one of the state teachers colleges or state university,

3. or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent:

"All county school superintendents elected on the first Tuesday in April, 1927, and thereafter, shall hold said office for a term of four years from and after the first Monday in July following their election, or until their successor is elected and qualified, and all vacancies caused by death, resignation, refusal to serve, or removal from the county, shall be filled by the governor by appointment for the unexpired term:***"

A county superintendent elected within three years after a renewal of his certificate is qualified. State ex inf. V. Hodge, 320 Mo. 877, 8 S. W. (2d) 881.

A person holding a certificate for a period of two years is qualified for the office of superintendent. State ex inf. v. Hollowell, 288 Mo. 674, 233 S. W. 405-703.

This section of the statutes will become inoperative on and after November 22, 1943, by reason of the fact, that a new section No. 10609 was enacted by the 62nd General Assembly and this legislation is known as House Bill No. 94.

Under the new section the qualifications of the county superintendent of public schools will be altered considerably, and any elections or appointments on or after November 22, 1943, must comply with the new section.

Governor Forrest C. Donnell

-3-

Nov. 16, 1943

The reason this new section is inoperative until November 22, 1943, is any act enacted and approved prior to the adjournment of the Legislature which contains no emergency coming within the exceptions of said Section 36, Article IV of the Constitution, as amended, will be controlled by said Section 659, R. S. Missouri, 1939, and will become effective ninety days after the adjournment of the session at which it is enacted and approved; except an act approved by the Governor after the adjournment of the session of the legislature will not become effective, under the provisions of Section 36, Article IV of the Constitution of Missouri, as amended, until ninety days after approval thereof by the Governor.

C O N C L U S I O N N .

From the above and foregoing, it is the opinion of this office that any person at least twenty-four years old, a citizen of the county from which he is appointed, holding a state certificate, authorizing him to teach in the public schools of Missouri, may be appointed county superintendent of public schools of his county and he may qualify and take such office on his appointment.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:LeC

STATE BUILDING COMMISSION: Employment of architects for
PURCHASING AGENT: remodeling eleemosynary and penal
institutions under State Building
Commission Act does not have to
be approved by State Purchasing
Agent.

November 18, 1943

Hon. Forrest C. Donnell
Governor of the State of Missouri
State Capitol Building
Jefferson City, Missouri



Dear Governor Donnell:

We have for attention your letter of November 10th, in which you enclose a copy of the Resolution of the State Building Commission.

You desire to have our opinion as to whether the engagement of the firm of Keene and Simpson of Kansas City, Missouri, to perform the services as set forth in the Resolution, in connection with the rehabilitation and the correction of defects in the custodial cottages in the School for the Feeble-minded at Marshall, Missouri, as set forth in the Resolution, requires the sanction and approval of the State Purchasing Agent to make said engagement valid. In other words, you desire to know whether the engagement of this firm shall be made by the State Purchasing Agent or by the State Building Commission.

By a Joint and Concurrent Resolution of the Senate and House of Representatives, an amendment to the Missouri Constitution was proposed. This resolution is found at page 174, Laws of Missouri, Extra Session, 1933-1934.

Thereafter, said amendment to the Constitution was submitted to the qualified voters of the State at a special election on May 15, 1934, and was adopted.

This amendment provides that the General Assembly shall have power to contract or to authorize the contracting of a debt on behalf of the State and to issue bonds, not exceeding in the aggregate \$10,000,000, for the purpose of repairing, remodeling or rebuilding the eleemosynary or penal institutions of this State.

At the same Extra Session of the General Assembly (Laws of Missouri, page 107, Extra Session, 1933-1934), the General Assembly enacted a law creating the "State Building Commission," consisting of the Governor, Attorney General, Secretary of State, State Auditor, State Treasurer and State Superintendent of Schools. It was provided in said act that same should take effect and be in force when and after said proposed Constitutional amendment was adopted by the people of the State.

In 1934, in the case of State ex rel. State Building Commission, et al. v. Smith, State Auditor, 74 S. W. (2d) 27, 335 Mo. 840, the legality of this Constitutional amendment, and the bonds issued in conformity therewith, was submitted to the Supreme Court, and, in said case the court said:

"At the same session (Laws of Mo., Extra Session, 1933-34, p. 107 (Mo. St. Ann. Secs. 13748c and note, 13748d to 13748l, p. 6521)), the General Assembly enacted a law creating a state building commission. The act directed the commission to determine the needs of the eleemosynary and penal institutions and divide among them, according to said needs, the money realized from federal aid and the sale of the \$10,000,000 of bonds to be issued under said amendment. It authorized the commission to acquire land, provide plans and specifications, and make contracts in furtherance of the contemplated improvements. It provided that the expenses of said improvements be paid from the money realized from federal aid and the sale of the bonds. It also provided that the law would take effect on the adoption of the proposed amendment by the people of the state. It is well settled that a law may be enacted to become effective on the happening of a future contingency. State ex rel. Maggard v. Pond, 93 Mo. 606, loc. cit. 621, 6 S. W. 469; In re Poindexter v. Pettis County, 295 Mo. 629, loc. cit. 636, 246 S. W. 38."

(Underscoring ours.)

In this suit the validity of these bonds was sustained.

We think that it was the intention of the Legislature, in creating the State Building Commission and designating the executive officers of the State as the members of the Commission, to delegate to the Commission the full power to determine the needs of the eleemosynary institutions and to authorize it to acquire land, provide the plans and specifications, and make contracts in furtherance of the contemplated improvements, without the assistance of the State Purchasing Agent.

The State Purchasing Agent Act was enacted at the Regular Session of the 1933 General Assembly (Laws of Mo. 1933, page 410), which was, of course, previous to the creation of the State Building Commission and the adoption of the amendment to the Constitution heretofore referred to.

The State Building Commission, as created by the Legislature, was, and is, a free and independent body designated for the purpose of expending the funds derived from the sale of the bonds for repairing, remodeling or rebuilding all or any of the eleemosynary or penal institutions of this State, and it is the State Building Commission's responsibility and not the responsibility of the State Purchasing Agent to pass on the employment of the architects.

It is our opinion that if the Legislature had intended that the employment of the architects and other contractors, in connection with the expenditure of the \$10,000,000 fund to rehabilitate the eleemosynary and penal institutions of the State, should be approved by the State Purchasing Agent it would have said so directly in the Act itself.

CONCLUSION

It is, therefore, for the reasons above stated, the opinion of this department that the State Building Commission has the authority to engage the firm of Keene and Simpson to perform the services mentioned in the Resolution and that it will not be necessary that said engagement, or employment, be made by the State Purchasing Agent, nor necessary that it have his approval.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

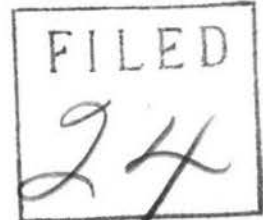
CRH:CP

PURCHASING DEPARTMENT:
BONDS:

Bond required by certifying officer must clearly show the intention to cover duties prescribed by House Bill No. 500, 62nd General Assembly.

November 20, 1943

11/22



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Under date of November 16, 1943, you wrote this office requesting an opinion, as follows:

"Section 14592 (House Bill No. 500 of the Sixty-Second General Assembly) reads as follows:

'No department shall make any purchase except through the purchasing agent as in this chapter provided. The purchasing agent shall not furnish any supplies to any department without first securing a certification from an official of the department, designated by the department to act in its behalf, and who shall furnish bond in an amount deemed sufficient by the Governor to protect the state against any loss, that an unencumbered balance remains in the appropriation and in the allotment to which the same is to be charged, sufficient to pay therefor. The purchasing agent shall be liable personally and on his bond for the amount of any purchase made by him without such certification and the departmental official shall be liable personally and on his bond for the amount of any false certification.'

"Your opinion, as soon as possible, is respectfully requested on the following question:

Will a faithful performance bond suffice as the bond of the official of the department, designated by the department to act in its behalf, under the provisions of House Bill No. 500, or is it required that the official of the department designated by the department to act in its behalf furnish a new bond conditioned on there remaining an unencumbered balance in the appropriation and in the allotment to which the same is to be charged, sufficient to pay therefor?"

Section 14592, R. S. Missouri, 1939, before its amendment by House Bill No. 500, enacted by the 62nd General Assembly, provided that no purchase should be made without a certificate from the state auditor that there remained an unencumbered balance in the appropriation and in the allotment to which the purchase was to be charged, sufficient to pay therefor.

By way of introduction to a discussion of your question, it is desired to call attention to some elementary principles of law applicable to bonds.

In 11 C. J. S., page 398, is found the following definition of "bond":

"A bond is an obligation in writing, usually under seal, binding the obligor to pay a sum of money to the obligee, sometimes with a clause to the effect that on performance of a certain condition the obligation shall be void."

And on page 417 is found the following rule concerning the construction of bonds:

"A bond, like other contracts, should be construed according to the fair import of the language used therein."

As a bond is a contract, the terms of the bond would to some extent govern the matters covered by the bond, and if the bond was given to comply with a statute, the statute under which the bond was given would also have to be considered. The question asked in your letter is very broad and the answer given will necessarily have to be equally as broad. Because the language of the bond and any statute under which the bond may be given would have to be considered, there may be some exceptions to the conclusion expressed herein.

In the recent case of State ex rel. Jefferson County v. Sheible, 163 S. W. (2d) 559, 1. c. 560, is found the following extract concerning construction of bonds:

"The general rule requires that a bond should be construed to carry into operation the reasonable intention of the parties, and such construction should be given when it can be fairly done, to support rather than defeat the bond. 11 C.J.S., Bonds, sec. 40. Furthermore, the rule is established in this State 'where a bond is given in pursuance of a statute, courts will, in enforcing the bond, read into it the terms of the statute which have been omitted, and will likewise read out of it terms included in it that are not authorized by the statute.' State v. Wipke, 345 Mo. 283, 133 S. W. (2d) 354, 357; State v. Vienup, 347 Mo. 382, 147 S. W. 2d 627.

"We had a case involving similar doctrines before us in Fogarty v. Davis, 305 Mo. 288, 264 S. W. 879, 880. In that case the court found that through inadvertence the wrong printed form of bond was used. However, it held that the statutory provisions intended

must be read into the bond given, stating: 'The rule in this state is that, in construing a statutory bond, the provisions of the statutes must be read into it and construed as a part of it. "When parties execute a statutory bond they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions. * * * These provisions are a part of the bond of which both principal and surety must take notice." State ex rel. v. (Manhattan) Rubber Mfg. Co., 149 Mo. (181), loc. cit. 212, 50 S. W. (321), 330. " * * * This does not strike down the hornbook propositions that the obligation of the surety should not be stretched or swollen by mere implication, and that sureties are favorites of the law and are entitled (subject to some qualifications) to stand on the terms of the bond, construed strictissimi juris. It merely puts the matter on a common sense footing as between man and man by reading the written law into the bond, discerning the objects to be subserved by the bond, and getting at the true intent and meaning of the bond by applying its terms to the objects sought. The general language of the bond must be interpreted in the light of these considerations." Henry County v. Salmon, 201 Mo. (136), loc. cit. 162, 163, 100 S. W. (20, 27. "All statutory bonds are to be construed as though the law requiring and regulating them was written in them. * * *" Zellars v. (National) Surety Co., 210 Mo. (86), loc. cit. 92, 108 S. W. (548), 549.' See Camdenton Consol. School Dist. v. New York Cas. Co., 340 Mo. 1070, 104 S. W. 2d 319."

In the early case of State ex rel. Moore v. Sandusky, 46 Mo. 377, 1. c. 381, is the following:

"No principle is better settled than that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further."

Following this case, in the case of The Home Savings Bank v. Traube, 75 Mo. 199, l. c. 202, we find the court again stating the same principle:

" * * * The general rule in regard to the liability of sureties, is well settled and has been repeatedly announced by this court. In the State v. Sandusky, 46 Mo. 381, it was said: 'The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further.' The same rule is asserted in other cases. Blair v. Perpetual Ins. Co., 10 Mo. 560; Nolley v. Callaway Co., 11 Mo. 463; State v. Boen, 44 Mo. 262; Orrick v. Vahey, 49 Mo. 431; City of St. Louis v. Sickles, 52 Mo. 122."

In this case the principal had given bond for the faithful performance of his duties as a bookkeeper in a bank, and at times he performed services as teller in the bank. The court held his bondsmen liable on the bond for the wrongful acts committed as bookkeeper but not liable for the wrongful acts committed while acting as teller.

In another early case, State to the use of Carroll County v. Roberts, 68 Mo. 234, l. c. 236, we find another statement of the principle regarding the construction of bonds:

"The State cannot, by a legislative act, materially modify a contract between herself and a citizen, any more than she can

impair the obligations of a contract between citizens. The Legislature cannot increase or vary the obligations of a citizen in a contract entered into by him with the State, and the effect of such legislation as we are considering, if it does not release the security, is to extend his liability on the bond for a longer period of time than he agreed to be bound, and to increase the risk he has taken beyond that which he assumed when he executed the bond. By the law, when the obligation was entered into, the collector was required to settle with the county court on the 3rd Monday in December. By the act of 1870, that settlement was postponed to the 3rd Monday in January. No officer in the State, nor any judicial tribunal could, after the act of 1870, demand of the collector a settlement before the 3rd Monday in January, or the payment of the balance of moneys then in his hands within thirty days after such settlement; and to hold the securities liable, under these circumstances, would be to declare that the State, by an act of the Legislature, may extend the time for which the securities have agreed to be bound for the principal, and by thus modifying the contract, hold them liable for risks which they did not agree to take. The State has no more right or authority to change a contract betwixt her and an individual, than she has to compel the individual to make such a contract in the first instance."

This was a suit on a collector's bond and the law respecting the time for making settlement had been changed and more time allowed the collector for making settlement.

In a suit on an appeal bond, in the case of Schuster v. Weiss, 114 Mo. 158, 1. c. 169, the court used the following language:

"And while the authorities all agree that the creditor and principal cannot vary or enlarge the liability of the surety, it is equally well settled that the state or government cannot change the responsibility of the surety on official bonds to the state by changing or enlarging the contract of the principal, by act of the legislature. Accordingly it was ruled in *State v. Roberts*, 68 Mo. 234 that a change in the law by which the time for the annual settlement of county collectors is fixed a month later than that provided in the law when the bonds of the collectors were given, operated to discharge the sureties. And in *Bartlett v. Attorney General, Parker*, 278, and *Bowdage v. Attorney General, Parker*, 278, and *Bowdage v. Attorney General, Parker*, cited and approved by Metcalf, Judge, in *Grocer's Bank v. Kingman*, 16 Gray, 473, it was held that a bond given as security for a collector of customs was held not to extend to a new duty laid on certain articles after the bond was given. See also *Bonar v. McDonald*, 3 H. L. Cas. 226; *Pybus v. Gibb*, 88 English Common Law Reports, 902. These cases sufficiently indicate the law of the adjudicated cases."

CONCLUSION

From the foregoing, it is the opinion of the writer that any bond given to comply with the provisions of Section 14592, R. S. Missouri, 1939, as amended by House Bill No. 500, enacted by the 62nd General Assembly, Laws of 1943, page 1004, should clearly and unequivocally show by its terms that it is given for the purpose of complying with that law. In the event of the designation of some person not heretofore under bond for the performance of the duties prescribed by House Bill No. 500, enacted by the 62nd General Assembly, a bond conditioned for the faithful performance of the duties of certifying officer under the provisions of Section 14592,

Hon. Forrest C. Donnell

-8-

November 20, 1943

as amended by House Bill No. 500, would be sufficient. However, for an officer who is already required to give a bond for the performance of his duties, a new bond should be required which would clearly show the intention of the parties that it should cover the performance of the new duties.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

WOJ:HR

GOVERNOR
PUBLIC SERVICE COMMISSION)
VACANCIES

- 1) Vacancies in Commission shall be filled by the governor for the unexpired term.
- 2) Governor must submit name of appointee for confirmation to the Senate at the next general assembly whether in regular or special session.

December 22, 1943

12/22
FILED
24

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This is to acknowledge receipt of your letter of December 21, 1943, as follows:

"Section 5580 of the Revised Statutes of Missouri of 1939, with reference to the public service commission, concludes as follows:

'Vacancies in said commission shall be filled by the governor for the unexpired term'.

"Your opinion, as soon as possible, is respectfully requested on the following question:

"Should the appointment of a person to fill an unexpired term in said commission be made subject to the advice and consent of the senate?"

Section 5580, R. S. Mo. 1939 provides as follows:

"The commission shall consist of five members who shall be appointed by the governor, with the advice and consent of the senate, and one of whom shall be designated by the governor to be and, upon being so designated, shall be chairman of said commission. Each commissioner, at the time of his appointment and qualification, shall be a resident of the state of Missouri, and shall have resided in said state for a period of at least five years next preceding his appointment and qualification, and he shall also be a qualified voter therein and not less than twenty-five years of age. One of said commissioners shall hold office for two years from the beginning

of his term of office and until his successor shall qualify; two of said commissioners shall hold office for a term of four years from the beginning of their terms of office and until their successors shall qualify, and two of said commissioners shall hold office for a term of six years from the beginning of their terms of office and until their successors shall qualify. The term of office of each commissioner shall begin on the date of the taking effect of this chapter, and the appointment of each of said commissioners shall be made and announced by the governor immediately after the taking effect of this chapter. The governor at the time of making and announcing the appointment of said commissioners, as well as in the commission issued by him to each of them, shall designate which of said commissioners shall serve for the term of two years, and which shall serve for the term of four years, and which shall serve for the term of six years, as aforesaid, and also which shall be the chairman of the commission. Upon the expiration of each of said terms, the term of office of each commissioner thereafter appointed shall be six years from the time of his appointment and qualification and until his successor shall qualify. Vacancies in said commission shall be filled by the governor for the unexpired term."

From an analysis of the aforementioned section it will be observed that in the opening sentence it is provided that the commission shall consist of five members who shall be appointed by the governor, with the advice and consent of the Senate. It will be further noted that the terms of office of the particular commissioner is staggered. It will be further noted that this section sets forth the qualifications that a person must have in order to be qualified as a commissioner. With these observations in mind we now direct our attention to the last sentence in the section which reads:

"Vacancies in said commission shall be filled by the governor for the unexpired term."

In arriving at the true intention of the legislature in placing this sentence in the section it is incumbent upon us to view the whole section together. For it is said in the case of Davis Construction Co. Inc. v. State Highway Commission, 141 S. W. (2d) 214, 1.c. 221:

"It is a well settled rule that all parts of a statute must, if possible, be reconciled and all given meaning and effect, and that a party cannot take out isolated sections and disregard other and equally important sections of the statute."

Honorable Forrest C. Donnell

December 22, 1943

It is our view that whether this sentence had of been placed in the statute or not, the governor would have had the authority and the duty to appoint a person to fill the unexpired term, where one existed, and would of had this authority under Section 11, Article V of the Constitution which provides as follows:

"When any office shall become vacant, the Governor unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

It will be noted from the reading of this provision that if the governor acted under this section that the person appointed would continue in office until a successor shall have been duly elected or appointed, and qualified, according to law, whereas, an appointment made in pursuance to the aforesaid sentence mentioned in section 5580 supra, the person appointed shall continue in office until the end of the unexpired term. In other words, the legislature may have had in mind when they placed this sentence in the section, that it was to definitely carry out their intention of staggering the terms of office of the commissioners. Another and different view may be expressed logically we believe in that it must through the force of the sentence aforesaid, that such person must certainly contain the qualifications as is provided for in this section, or in other words, the preceding terms and conditions of the section cannot be ignored but must be followed, and if they are followed for one purpose we see no reason why they should not be followed for all purposes. If our conclusions in this particular are correct then a person appointed by the governor must also be approved by the Senate, as is provided for in the first sentence of the section, in addition to meeting the other qualifications as to age and residence, etc. We are mindful of an interpretation that at first blush may seem plausible in that the legislature by the placing of this sentence in the section intended to delegate exclusively to the governor the right to make appointments in case of vacancies without the advice and consent of the Senate but in view of the reasons which present themselves on the contrary view it is our view that this last contention is not tenable.

We call attention to the case of O'Malley v. Continental Life Ins. Co., 75 S. W. (2d) 837, l.c. 839, par. 4-5, wherein the Court said:

"The legislative intent in the enactment of the law is to be sought and effectuated. This is the rule

Honorable Forrest C. Donnell

December 22, 1943

of first importance in statutory interpretation. To ascertain such intent we invoke as aids such of the auxiliary rules of interpretation as may seem to bear with incidence as direct as may be upon the matter in hand. Briefly stated, these in substance recognize and require that the language of the act be considered (25 R.C.L. sec. 216, p. 961); that each word be accorded its ordinary meaning, generally speaking; and that in construing a word or expression of a statute susceptible of two or more meanings the court will adopt that interpretation most in accord with the manifest purpose of the statute as gathered from the context (Id., sec. 237, p. 994)."

We therefore must conclude that through the force of the last sentence of the section that as soon as a vacancy exists in said commission, that the governor has the authority to immediately appoint a person to fill said vacancy and in so doing he designates that such person shall fill out the unexpired term of the commissioner whose place the appointee is filling, and as soon as the legislature convenes, whether by general or special session, the governor shall present the appointee's name to the Senate for their confirmation.

Without dealing with that question with particularity in this opinion, we call attention to an opinion heretofore rendered by this office on November 10, 1942, to the Honorable Forrest C. Donnell, Governor of Missouri, Jefferson City, Mo., which opinion deals with the submission of numerous recess appointments in which opinion an appointment made under this section was at issue. It is our view that this opinion covers this latter question. Therefore, we attach the opinion instead of specifically detailing our views further in this opinion.

CONCLUSION

It is the opinion of this department that when a vacancy occurs in the Public Service Commission, that the Governor of Missouri has the authority and the duty to immediately appoint a commissioner for the unexpired term of the commissioner whose place has become vacant, and such new appointee must have all the qualifications as are set forth in section 5580, R. S. Mo. 1939.

Honorable Forrest C. Donnell

December 22, 1943

2) The governor must submit the name of the commissioner whom he has designated and appointed in the case of a vacancy for confirmation to the Senate at the next general assembly, whether such assembly be meeting in regular or special session.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney General

By VANE C. THURLO
Acting Attorney-General

BRC:lr

SCHOOLS: School districts can pay out of school funds for apparatus and labor to furnish lunches to children attending school.

January 15, 1943

Hon. J. R. Eiser
Prosecuting Attorney
Oregon, Missouri



Dear Mr. Eiser:

We have your letter of recent date in which you submit the following request for an opinion:

"Mr. G. Frank Smith, County Superintendent of Schools in and for Holt County, Missouri, has requested that I secure an Opinion from your office as to whether or not a public school in Holt County, Missouri, can pay from school funds the cost of necessary labor used for preparing and serving lunches in said school."

Section 10339, R. S. Missouri, 1939, reads in part as follows:

"The board of directors, or board of education, shall have the power, in its discretion, to install in the school buildings under its care the necessary apparatus and appliances, and to purchase the necessary food to enable it to provide and sell lunches to children attending the schools: Provided, however, that such lunches shall not be so sold for a less price than the cost of the food, exclusive of the cost of the necessary apparatus and appliances and exclusive of costs necessary and incidental to the purchase of the food and the preparing and serving of the lunches: * * * * *"

It will be seen from the foregoing statute that the school districts are given authority to provide necessary apparatus and appliances and to purchase necessary food to provide and sell lunches to children attending the schools. Nothing definite is said as to how such equipment and food

January 15, 1943

shall be paid for. However, it is a well established principle of law that where an officer or a board is given express authority to do a specific thing, such grant of authority carries with it such authority as is necessary to accomplish the thing which is authorized to be done. The rule has been stated in the following language:

"The rule respecting such powers is that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers." Throop's Public Officers, Sec. 542, p. 515." (State ex inf. v. Wymore, 132 S. W. (2d) 979, 987; 345 Mo. 169)

Therefore, it seems the school districts are given express authority to provide lunches for children attending school, and it must follow that they have the implied authority to do whatever is necessary to provide such lunches. Of course, it would be necessary to purchase some equipment and to furnish certain labor in order to provide the lunches for the children. The directors, therefore, must have the authority to furnish the equipment and the labor necessary, or else the authority to furnish lunches would mean nothing.

The proviso quoted above clearly indicates that the Legislature intended that the directors should pay for the apparatus and for the labor necessary to provide and serve the lunches. The proviso clearly contemplates that the cost of the apparatus and of the labor necessarily involved in the furnishing of lunches is to be provided by the school district.

CONCLUSION

It is, therefore, the opinion of this office that a public school can pay from school funds the cost of necessary labor used in preparing and serving lunches to the children attending school.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

MUNICIPAL CORPORATIONS:

Mayor cannot vote to break tie-vote
on a council committee or board of
public works.

February 9, 1943.



Hon. Ben Ely
City Attorney
National Bank Building
Hannibal, Missouri

Dear Mr. Ely:

The Attorney-General wishes to acknowledge receipt of your letter of February 2, 1943, in which you request an opinion of this Department. Your request, omitting caption and signature, is as follows:

"I do not know whether it is your duty to give opinions to municipalities in the state. Our Mayor and Council have requested me to get an opinion from you, if possible, upon a question concerning our city government. I will therefore submit it to you, and if you find it possible to give an opinion, it will be of great assistance to the city.

"As you know, Hannibal is a city under special charter. The question has arisen as to whether the Mayor of the city is an exofficio member of committees of the City Council and of the Board of Public Works. It so happens that one of the council committees contains four members, and they are divided equally as to a certain matter now pending. The Board of Public Works, which also contains four members, is divided equally on another matter; and the question arises as to whether the Mayor has a right to break the tie in either instance. I may say that

Feb. 9, 1943.

there is no provision in the city charter, the ordinances or the standing rules of the council, covering this situation."

We note in the last sentence in your letter you make the statement that there is no provision in the city charter, the ordinances or the standing rules of the council, covering the situation described in your letter. We will proceed on that premise in view of the fact that we do not have a copy of the Charter of Hannibal, and since we know that you are familiar with such set of laws.

In 46 C. J., page 1031, we find the following statement:

"The powers and authority of public officers are fixed and determined by the law."

We further find in the case of Lamar Township v. The City of Lamar, 261 Mo. 171, 1. c. 189, the following language:

"Officers are creatures of the law whose duties are usually fully provided for by statute. * * * * * In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

Under such construction of the law we come to the conclusion that in order for the Mayor of your city to break a tie-vote in one of the committees or in the board of public works, that he must be given power so to do by statute.

We are familiar with the rule of law which provides that where certain duties are prescribed for an officer that he is permitted to assume other authority in order to carry out the acts and powers given to him under the statute. However, we do not feel that in this particular case such rule would apply. It strikes us that when the committees were

Feb. 9, 1943.

formed in the Council and also on the Board of Public Works and when the number of four committeemen was specified, that the person or persons arriving at this number must have realized or could have foreseen that a situation such as you face at the present time was likely to arise. Still, there was never any provision made whereby the Mayor could vote on either one of these committees in order to break a tie.

There are decisions in this State which provide that the Mayor may vote to untie a tie-vote in the case of passage of ordinances. Such decisions are Mound City ex rel. v. Shields, 278 S. W. 798 and Grant City v. Salmon et al., 288 S. W. 88. However, these seem to be about the only cases which we can find that give the mayor power to untie a vote in the council. There is one other exception along this line, with reference to special road districts, but which would not affect this particular matter.

Therefore, it is the conclusion of this Department that the Mayor of the City of Hannibal, under the circumstances as related in your request, may not vote to break a tie in a committee of the City Council or in the Board of Public Works in the City of Hannibal, Missouri.

Yours very truly,

JOHN S. PHILLIPS
Assistant Attorney-General

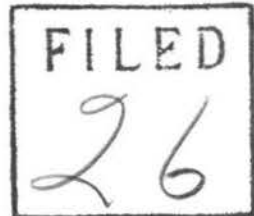
APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

LABELING AND TAGGING: All "commercial feeding stuffs" sold, offered or exposed for a sale, or disposed of in this state, shall be labelled and tagged in accordance with the provisions of Article 22, Chapter 102, R. S. Mo. 1939, and the Commissioner may only withdraw from sale such feeds as listed in Section 14329, April 19, 1943 R. S. Mo. 1939.

Mr. H. D. Elijah
Livestock and Feed
Department of Agriculture
Jefferson City, Missouri



Dear Mr. Elijah:

This is in reply to your letter of recent date wherein you submit the following statement and request:

"The Commodity Credit Corporation is shipping carloads of soybean oil meal into Missouri. This soybean oil meal is not labeled, registered, or tagged in accordance with the Missouri Feed Law, Section 14320, Article 22, R. S. 1939, and Section 14326.

"According to Section 14321, 'Before any manufacturer, importer, jobber, firm, association, corporation, partnership or individual shall sell, offer or expose for sale or distribution in this state any feed etc.'

"Will you please render us a decision as to the authority of the Feed Division of the State Department of Agriculture to suspend from sale, according to Section 14321 and Section 14329, soybean oil meal owned by the Commodity Credit Corporation, manufactured or processed by an out-of-state company which ships the meal to a Missouri dealer and the Missouri dealer pays for the meal. The soybean oil meal is then sold to farmers.

"Does the Feed Division have authority to suspend this soybean oil meal from sale if it is not labeled or tagged when in the hands of the Missouri dealer after he has actually paid for the soybean oil meal?"

April 19, 1943

The term "commercial feeding stuffs" is defined in Section 14319, R. S. Missouri, 1939, as follows:

"The term 'commercial feeding-stuffs' shall be held to include all feeding-stuffs used for feeding livestock and poultry, except whole seeds or grains, and unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, whose hays, straws, cotton seed hulls and corn stover, pure corn chops and pure ground ear corn, when the same are not mixed with other materials, but the term shall not apply to other materials containing sixty (60) per cent or more of water."

Under Section 14320, each bag or package of "commercial feeding-stuffs" sold, offered or exposed for sale or distributed within this state shall be tagged or labeled. Under Section 14321, R. S. Missouri, 1939, it is provided as follows:

"Before any manufacturer, importer, jobber, firm, association, corporation, partnership or individual shall sell, offer or expose for sale or distribution in this state any feed as defined in this article he or they shall obtain a certificate of registration from the Missouri state department of agriculture. * * *"

You will note from these statutes that they are directed at transactions within the state. The General Assembly would not be authorized to control or regulate the sale, or exposing for sale, of "commercial feeding-stuffs" outside the state. However, after such feeds come into the state, if they are then sold, offered or exposed for sale or distribution, the state may regulate them by such statutes as Section 14320 and Section 14321, supra.

The power to suspend from sale feeds which do not comply with the provisions of the law is provided for under Section 14329. The feeds which may be suspended from sale, however, are described in said Section 14329, in the following language:

"Any person who shall sell, offer or expose for sale or distribution in this state any feed without complying with the requirements of this article, or who shall sell, offer or expose for sale or distribution any feed containing a smaller percentage of crude protein or crude fat or nitrogen free extract or a larger percentage of crude fibre than guaranteed for that brand shall be guilty of a violation of this article. Any person who shall fail to correctly declare the specific common names of all of the ingredients of which a feed is composed shall be guilty of a violation of this article. Any person who shall mix or adulterate any feed with rice hulls, chaff, peanut hulls, dirt, ground or crushed corn-cobs, sawdust, weed-seeds, the viability of which has not been destroyed except in poultry feeds or with more than five per cent of mineral substances with the exception that this five per cent limitation shall not apply to mineral feeds, or who shall mix or adulterate any feed with materials of little or no feeding value, or with substances injurious to the health of domestic animals or poultry, or who shall sell, offer or expose for sale or distribution any feed so mixed or adulterated shall be guilty of a violation of this article * * * * *

In addition to the punishment under the criminal laws for the violation of the said laws, said Section 14329, provides as follows:

"* * * * In addition to the penalties imposed in this article, any lot of feed mixed or adulterated as prohibited in this section may be ordered temporarily withdrawn from sale by the commissioner, and upon court order, may be seized and condemned, sold or destroyed, and the proceeds from any such sale deposited in the 'agricultural fees fund'. * * * * "

It will be noted that if the feeds are mixed or adulterated in the manner prescribed in Section 1432, the Commissioner of Agriculture may order such feeds temporarily withdrawn from sale. But, we do not find any provisions of

April 19, 1943

the law which would authorize the Commissioner to withdraw "commercial feeding-stuffs" from sale because they have not been labelled or tagged and registered as is required by Section 14320 and Section 14321, supra. The law makes it a misdemeanor to fail to register and label "commercial feeding-stuffs." (Sections 14329 and 14330) That seems to be the only penalty prescribed for failing to register or label such feeds.

The provisions of Section 14329, authorizing withdrawal of the feeds described therein from sale are penal sections and are to be strictly construed. To construe this act to include feeds which are not registered or labelled would be contrary to the rule of construction of criminal statutes, and we do not think such construction would be authorized.

CONCLUSION

From the foregoing, it is the opinion of this department that the Commissioner of Agriculture may only suspend from sale "commercial feeding-stuffs" which are mixed or adulterated, as set out in Section 14329, supra, and that a failure to register or label "commercial feeding-stuffs" would not authorize their suspension from sale.

We are further of the opinion that if "commercial feeding-stuffs" which are not labelled or tagged as required by law, are sold, or offered or exposed for sale of distribution in this state, the person so doing is guilty of a misdemeanor.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:NS

APPROPRIATIONS:

An Appropriation Act which fails to designate the fund from which it is payable should be paid out of general revenue.

August 11, 1943

818
FILED

26

Hon. H. D. Elijah
Director of Livestock and Feed
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"House Bill 419, Section 30A, appropriated to the State Department of Agriculture according to Article 18, Chapter 102, Revised Statutes of Missouri 1939, to be awarded as premiums made in connection with agriculture exhibits by members of boys' and girls' 4-H Clubs, vocational agriculture students, and Future Farmers of America, of Missouri, and State Breed Shows and Sales of beef cattle, dairy cattle, hogs, sheep, and poultry for encouraging the immediate production, distribution, and use of superior breeding stock for the years 1943 and 1944, the sum of \$30,000.00.

"This Section does not state what fund this money was to be paid from. The State Department of Agriculture felt that it was from general revenue, since that was undoubtedly the intent of the Legislature.

"Will you please prepare a written opinion on this and send it to us at your earliest convenience?"

The Section of the Appropriation Act to which you refer in House Bill 419, Section 30A, reads as follows:

"There is hereby appropriated to the State Department of Agriculture according to Article 18, Chapter 102, Revised Statutes of Missouri 1939, to be awarded as premiums made in connection with agriculture exhibits by members of boys' and girls' 4-H Clubs, vocational agriculture students, and Future Farmers of America, of Missouri, and State Breed Shows and Sales of beef cattle, dairy cattle, hogs, sheep, and poultry for encouraging the immediate production, distribution, and use of superior breeding stock for the years 1943 and 1944, the sum of \$30,000.00."

From the reading of this Section and as stated in your request, the General Assembly failed to designate the fund to which this appropriation should be charged.

Section 19 of Article X of the Constitution which controls the General Assembly and specifies the requirements of an appropriation act reads as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The part of this Section which pertains to your question is that the Act shall distinctly specify the sum appropriated and the object to which it is to be applied. Referring to the Appropriation Act, we think that it complies with the provisions of said Section 19. The only question left then is what fund should it be charged to in the absence of any designation by the General Assembly. In construing appropriation acts, the rule is that they should receive a strict construction but not such a construction as would make meaningless the act of the General Assembly if it is possible to give such act a construction which would give it force and effect. In the case of *State ex rel. State Tax Commission v. Smith, State Auditor*, 66 So. 61, 1.c. 64, the Supreme Court of Alabama announced the principle which is applicable here as follows:

"While appropriation bills should be construed without liberality toward those who claim their benefits, they should not be so strictly construed as to defeat their manifest objects."

In examining the State Budget Act, we think that the above Appropriation Act is in compliance with the State Budget Act. Another principle should be applied in construing acts of the General Assembly which is stated in *Graves v. Little Tarkio Drainage District No. 1*, 134 S. W. (2d) 70, 1.c. 78:

"* * * It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d Ed.) 731, 732, Sec. 380. Moreover, it is presumed that the Legislature intended

every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect.'* * * * *

Coming now directly to your question, we find that in Vol. 59 C. J., page 232, para. 378, a principle announced which is applicable to the question here under consideration:

"* * * * *Disbursements for a purpose for which a special fund has been created or set up must be made from such fund rather than from the general funds of the state; but appropriations not specifically made payable out of a special or particular fund are payable only from the general fund. * * * * *"
(Emphasis ours.)

In the case of Ingram v. Colgan, 106 Calif. 113, the Supreme Court of that state at l.c. 117 in considering a question similar to the one here under consideration said:

"The true test as to whether any particular language in an act is sufficient to make an appropriation is here found. 'To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid.' If the amount be certain, one of the reasons for the constitutional requirements is complied with, in that the people are enabled to determine how much of their money is to be devoted to the named purpose. The designation of the fund likewise enables the people to see how much of the moneys set apart to a particular fund is to be drawn from it and used for the specific end. But under our system, countenanced by the custom of years, it is not necessary in all cases that the act in terms should name the fund. The general fund itself

is defined to be 'the moneys received into the treasury, and not specifically appropriated to any other fund.' (Pol. Code, sec. 454.) From these moneys all appropriations are paid which are not made payable out of any other especially named fund."

In searching through our statutes, we fail to find where our lawmakers have defined the general fund or general revenue but as a matter of practice, we think the same definition of general fund has been applied in this state as was applied under the code in California.

Also in *Miller v. Childers, State Auditor, et al.*, 238 Pac. 204, the Supreme Court of Oklahoma in considering a question similar to the one here under consideration made the following statement, l.c. 207:

"In 36 Cyc. page 892, paragraph C, the author collects authorities on the point, and says that: 'Nor need the statute designate the fund out of which the money is drawn.'

"In the early California case of *Proll v. Dunn*, 80 Cal. 220, 22 P. 143, the court gives an analysis of the question which we approve, and which, because the question is presented in this case for the first time in this jurisdiction, we extensively quote. The court said:

"Neither the Constitution nor the Code requires that an appropriation act shall specify the fund out of which the appropriation shall be paid, nor is it usual in appropriation acts to do so. If such a specification is required, the wheels of the government ought long since to have stopped, for out of many acts which we have examined, including the general appropriation bills for the current and past years, we find none which make such designation. It has become and is the custom in this

state, of very general, but not universal, application, to use the phrase "appropriated out of any money in the treasury not otherwise appropriated;" but it seems to be mere custom, not founded upon any constitutional or other legislative requirements. And we learn from the argument that the comptroller interprets that phrase to mean "out of the general fund." We know of no law which authorizes such an interpretation. On the contrary, it would seem that everything authorized by law to be paid out of the state treasury is payable out of the general fund, if not specially made payable out of some specific fund, as the "school fund," the "interest and sinking fund," and the like. The truth is, there are not many separate funds in the treasury, but there are many appropriations, and most of the latter are payable out of the same fund--the general fund.'

"The Constitution of Colorado required that every act making an appropriation where the money appropriated was not actually in the treasury should specify the revenue of the particular fiscal year out of which the appropriation was to be paid. An act was passed by the Colorado Legislature which did not specifically state the particular fiscal year out of which the appropriation was to be paid, but the same could be determined by implication, and the Supreme Court of Colorado, in *Goodykoontz v. People*, 20 Colo. 374, 38 P. 473, held:

"'Every legislative act making an appropriation, where the money appropriated is not actually in the treasury, should specify the revenue of the particular fiscal year out of which the appropriation is to be paid; but an act which does not definitely specify such revenue

August 11, 1943

is not void, provided such revenue can, from the language and purposes of the act, be ascertained with reasonable certainty.'

"The Constitution of Nevada is similar to that of Oklahoma with relation to the appropriation of money, and in State v. Westerfield, 23 Nev. 468, 49 P. 119, the Supreme Court of Nevada held that where an appropriation was made from the wrong fund, but was an appropriation proper for the Legislature to make, that the same was valid, and should be paid from the general fund, saying:

"We hold that the Legislature has made a valid appropriation for the payment of the salary in question, and that the same is payable, out of the general fund in the state treasury, the same as the salary of the Governor and most of the other state officers, and the same as other appropriations in which no specific fund is named. Section 19 of Article 4 of the Constitution provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law." It will be observed that it is not required that the fund out of which the appropriations are to be made shall be named in the appropriation act. Usually, if not always, other acts or the Constitution show what fund the money appropriated is to be drawn from."

In our research of the Missouri decisions, we fail to find where a question similar to yours has been before the court. However, we think that the authorities hereinbefore cited should be followed.

CONCLUSION.

From the foregoing, it is the opinion of this Department that the appropriation contained in Section 30A of

Hon. H. D. Elijah

-8-

August 11, 1943

House Bill 419 should be paid out of general revenue.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

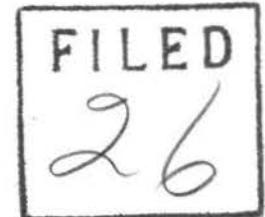
ROY McKITTRICK
Attorney General

TWB:PD

MARRIAGE LAW: House Bill 20. Charging of fees by probate judges and circuit judges in connection with issuance of marriage license.

August 16, 1943

8/19



Honorable Walter A. Eggers
Judge of the Probate Court
Perryville, Missouri

Dear Judge Eggers:

Under date of August 5, 1943, you wrote this office requesting an opinion as follows:

"The new Missouri marriage law provides that a Circuit Judge or Probate Judge may, for good cause shown, issue an order directing the Recorder to issue a Marriage License without delay. In other words he may waive the three day waiting period.

"Will you kindly advise whether a Probate Judge is permitted to make a charge for issuing such an order? The statute is evidently silent on this question."

The new Missouri marriage law which is now effective is House Bill No. 20, enacted by the Sixty-second General Assembly, which is as follows:

"Previous to any marriage in this state, a license for that purpose shall be obtained from the officer authorized to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is

solemnized by a person authorized by law to solemnize marriages. Before applicants for a marriage license shall receive a license, and before the recorder of deeds shall be authorized to issue a license, the parties to a marriage must at least three days before the date they desire such license to be issued, present an application for the license to the recorder of deeds. Upon the expiration of three days after the receipt of such application, duly executed and signed, the recorder of deeds shall issue the license unless one of the parties withdraws the application. Provided, however, that said license may be issued on order of the circuit or probate court or the judges thereof in vacation of the county in which said license is applied for without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor. Common law marriages hereafter contracted shall be null and void. Provided, however, that no marriage shall be deemed or adjudged invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person so solemnizing the same under the next preceding section, if consummated with the full belief on the part of the persons, so married, or either of them, that they were lawfully joined in marriage."

As stated in your letter, this bill makes no provision for the charging of a fee by the circuit or probate courts or the judges thereof in vacation for making an order that a marriage license be issued without the three-day waiting period.

The law is well established in this state that if no compensation is provided for an official act, no charge can be

made and that an officer in claiming compensation for his services must be able to point to the statute authorizing the charge to be made. Nodaway County v. Kidder, 129 S. W. (2d) 857, 344 Mo. 795; Ward v. Christian County, 111 S. W. (2d) 182, 341 Mo. 1115, Smith v. Pettis County, 136 S. W. (2d) 282, 345 Mo. 839.

It is quite obvious that unless a charge for making such order would be authorized by other statutes that no charge could be made.

The compensation of circuit judges is by statute fixed upon a salary basis. Sections 2214, 13387, 13389, 13393, 13394 and 13395, R. S. Mo. 1939. No statute has been found authorizing the judge of the circuit court to charge a fee for his services in making any order.

The judges of the probate courts are compensated upon a different basis, and are authorized to charge fees for their services. Section 13404 contains this authorization and further contains a schedule of fees which the probate judges are authorized to charge for their services. Most of the fees set out in this section relate directly to services in connection with the administration of estates and the whole fee schedule is not copied. But your attention is called to the following clauses:

"For copying any order, or record or paper, not herein provided for, for every hundred words and figures10

* * *

"For every verdict or judgment25

* * *

"For recording any settlement or instrument of writing, not otherwise provided for, for every hundred words and figures10

* * *

"For every certificate and seal50

* * *

"For filing every paper not herein specified05 "

If in making the order authorized to be made by House Bill No. 20, enacted by the Sixty-second General Assembly, a probate judge should perform any of the services for which compensation is allowed by Section 13404, and particularly those services herein set out, then such probate judge would be authorized to charge and collect for his services the fees prescribed by this section of the statute.

Conclusion

A circuit judge is not authorized by statute to charge fees for services rendered and cannot charge a fee for making an order authorizing the recorder of deeds to issue a marriage license immediately upon the filing of the application and without waiting three days. A probate judge, being authorized to charge fees for his services, may charge the statutory fee fixed for his services for any act he may be required to do, for which a fee is allowed to be charged, in the making of an order to the recorder of deeds waiving the three-day waiting period before the issuance of a marriage license required by House Bill No. 20, enacted by the Sixty-second General Assembly.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:EG

AGRICULTURE ()
EGG REGULATIONS ()

APPROVED EGG REGULATIONS.

September 11, 1943

Honorable John W. Ellis
Commissioner of Agriculture
Jefferson City, Missouri

9-17



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the validity of proposed egg regulations, a copy of which accompanied your request.

Your authority for these regulations is derived from Article 4 of Chapter 58, R. S. 1939.

Sec. 9909 of this article reads as follows:

"That the state food and drug commissioner shall enforce the provisions of this article and shall make suitable rules and regulations for carrying out its provisions. He shall determine the conditions under which eggs previously candled shall be recandled before sale in order to safeguard the purchaser against buying as a part of a lot eggs unfit for human food."

We have compared the proposed regulations with the authority granted under said Article 4 and we think they come within the scope of same and that you are authorized to issue such rules and regulations.

C O N C L U S I O N .

From the foregoing, it is the opinion of this

Hon. John W. Ellis

-2-

Sept. 11, 1943

department that the proposed egg regulations, a copy of which is attached to your request are authorized and valid.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

TWB:LeC

APPROVED:

ROY MCKITTRICK
Attorney General

SCHOOLS: Dissolution of Consolidated District may become effective when all the provisions of Section 10472, R. S. Mo. 1939, have been complied with.

October 18, 1943



Mr. John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of September 11th, 1943, in which you request an opinion from this department. Your letter reads as follows:

"Several years ago consolidated School District number five was organized which includes the school system of Potosi, Missouri. In this consolidated district is included a district formerly known as Pleasant Hill school district. Up to this year the school board have always maintained their public school including the eighth grade as before the consolidation. Now for some reason the school board of consolidated district number 5 have decided to discontinue said local school and transport the children to town.

"By actual count there are 26 children who belong in this school and practically all of them wish to stay in their own school. Their parents seem to feel the same way about it judging from a petition they have circulated and have brought in here.

"Just how do they go about getting out of Consolidated District number 5? That is

what they all wish to know. Since I am not so sure, I am asking your opinion."

Section 10472, R. S. Missouri, 1939, reads as follows:

"Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district and at said meeting, if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under article 3 of this chapter."

The abolishment of such an organization must follow all the provisions of the above statute and become effective and final.

Mr. John A. Eversole

-3-

October 18, 1943

CONCLUSION

It is, therefore, the opinion of this department that the dissolution of a consolidated school district may become effective when all of the provisions of Section 10472, R. S. Missouri, 1939, have been fully and completely complied with.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:HR

DEPARTMENT OF AGRICULTURE)
STATE OF MISSOURI)

The word "premium" construed in Sec. 30A, House Bill #419, to include ribbon prizes, the cost of which shall be paid out of such appropriation, where such ribbons are awarded pursuant to the act.

November 9, 1943

11-15
FILED
26

Honorable John W. Ellis
Commissioner
Department of Agriculture
State of Missouri
Jefferson City, Missouri

Dear Sir:

We are in receipt of your opinion request of recent date, which request reads as follows:

"Will you please inform me if, under Section 30A of House Bill 419, the Commissioner of Agriculture is permitted to use a sum of money from the appropriation mentioned for the purpose of buying ribbons awarded in the agricultural exhibits mentioned therein."

Section 30A of House Bill #419 reads as follows:

"There is hereby appropriated to the State Department of Agriculture according to Article 18, Chapter 102, Revised Statutes of Missouri 1939, to be awarded as premiums made in connection with agriculture exhibits by members of boys' and girls' 4-H Clubs, vocational agriculture students, and Future Farmers of America, of Missouri, and State Breed Shows and Sales of beef cattle, dairy cattle, hogs, sheep, and poultry for encouraging the immediate production, distribution, and use of superior breeding stock for the years 1943 and 1944, the sum of \$30,000.00".

Now turning to your question whether or not ribbons which are to be awarded to successful contestants can be

paid for out of the appropriations provided for in Section 30A, Supra, where such ribbons are to be used in connection with exhibits by the different organizations enumerated in Section 30A, Supra. It will be significant to note that the Act used the language "to be awarded as premiums". Therefore, we shall concern ourselves first with the proper interpretation that should be placed upon the word "premiums" and if the term is of sufficient scope and meaning, then we must hold that Section 30A, is sufficiently broad as to enable the Department of Agriculture to purchase ribbons and defray the expense of the same out of the \$30,000 appropriated under this Act. In Valentine's Law Dictionary, page 1002, we find the word "premium" defined as follows:

"A premium is a reward or recompense for some act done. It is known who is to give before the event. It is not to be confounded with a bet or wager, for in a wager it is not known who is to give until after the event. Moreover a wager is a stake upon an uncertain event."

(Alvord vs. Smith, 63 Ind. 52.)

Again, in Words and Phrases, Volume 33, page 371, we find this approved definition:

"'Premium' or 'prize' is an award or recompense for some act done; some valuable thing offered by a person for something done by others. It is distinguished from a 'bet' or 'wager' in that it is known before the event who is to give either the premium or the prize, and there is but one operation until the accomplishment of the act, thing, or purpose for which it is offered. People v. Cohen, 289 N.Y.S. 397, 400, 160 Misc. 10. "

With these definitions of the word "premium" in mind, we shall again observe the purpose and meaning of Section 30A, Supra. It should be first pointed out that this is an Appropriation Act, appropriating \$30,000 to be used in the furtherance of successful agricultural pursuits, and we think it goes without saying or the citation of some legal authority, if one can be found, that in most instances, the silk banner or ribbon which declares that the successful participant has won first, second or third award in his particular class, is of greater pecuniary value to the successful aspirant than the monetary amount that

November 9, 1943

might accompany the awarding of the ribbon. For a successful person can carry or display the ribbon advantageously to the advertising of his exhibit, not to say anything about the personal gratification of receiving the same. Therefore, in the light of the definition heretofore set out, it is our view that the Legislature fully intended through the use of the word "premium" that the State Department of Agriculture should follow the time and immemorial custom of awarding the silk ribbon and should accompany the awards with a monetary consideration and both the money and the cost of the ribbon to be defrayed by the \$30,000 appropriated by Section 30A, Supra, where such ribbons and emoluments were given as is provided in said section.

CONCLUSION

Any monetary award given pursuant to Section 30A, House Bill #419, may be accompanied with a suitable premium ribbon. The cost of such ribbon may be likewise defrayed out of such appropriations.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

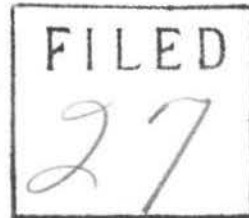
ROY McKITTRICK
Attorney-General

BRC:lr

ROAD DISTRICTS: Statutory method for dissolution provided for each type of district, must be followed.

October 12, 1943

10/16



Honorable John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Eversole:

Under date of October 5, 1943, you wrote this office requesting an opinion as follows:

"Irondale Special Road District of Washington County, Missouri was organized under the provisions of Article 10, Chapter 46, R. S. Mo. 1939 pursuant to an election held in accordance with Section 8704.

"There are now two propositions before the County Court; one, the disorganization of the district and two, if it is not disorganized to separate a portion of the present territory from the district.

"In proceeding on the question of the disorganization of the district, must the County Court follow the provisions of Section 8706 or may it follow the provisions of Section 8703 or 8731 in Article 11 of Chapter 46?

"If the district is to be disorganized is there any method whereby a certain portion of the territory may be separated or withdrawn from the district?

"I will appreciate an opinion from your office covering these questions."

It is assumed that Section 8703, referred to in your letter, is a stenographic error and should read "Section 8730," for Section 8703 has nothing to do with the dissolution of road districts but Section 8730 does pertain to the dissolution of a certain type of road district.

Section 8706, R. S. Mo. 1939, referred to in your letter, is the method prescribed for the dissolution of the type of road district authorized by Article 10, Chapter 46. Districts of this kind, sometimes called eight-mile districts, are created only after a vote of consent by the people of the proposed district, Section 8704, and Section 8706 provides the manner of dissolving such districts, which must be after a vote by the people shall have been in favor of the dissolution of the district.

Sections 8730 and 8731 of Article 11, Chapter 46, R. S. Mo. 1939, pertain to an entirely different road district.

The Legislature having expressly provided in Article 10, Chapter 46, the manner in which road districts organized under this article can be dissolved, no other method could be used to dissolve such district. The following quotation from the case of *Chilton et al. v. Drainage Dist.*, 63 S. W. (2d) 421, 1. c. 422, concisely states the rule of law applicable:

"* * * It is a well-recognized rule of construction as to statutes that ordinarily, where a statute limits a thing to be done in a particular form, it includes in itself a negative, namely, that such thing shall not be done in any other manner. *State ex rel. Barlow v. Holtcamp*, 322 Mo. 258, 14 S. W. (2d) 646; *State ex inf. Conkling v. Sweaney*, 270 Mo. 685, 195 S. W. 714."

There is no statutory method provided for withdrawing territory once included in the district, from the district.

Conclusion.

In the dissolution of a special road district organized under Article 10, Chapter 46, the procedure is prescribed in

Hon. John A. Eversole

-3-

Oct. 12, 1943

Section 8706, R. S. Mo., 1939.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:EG

TAXATION

SALES TAX: House Amendment No. 1 to House Bill 125 would subject all ultimate consumers of electrical current, steam heat, water and gas, to the provisions of the sales tax, except those which are exempt under Sections 11409 and 11453 of the Act.

April 14, 1943



Hon. Joseph A. Falzone
Missouri State Senator
25th District
Jefferson City, Missouri

Dear Senator Falzone:

This is in reply to yours of April 12, wherein you submit and request as follows:

"If you will refer to the Journal of the House for Thursday, April 1st, Page 928, you will find that Amendment No. 1. was adopted by the House and reads as follows:

'A tax equivalent to two (2%) percent of amounts paid or charged on all sales of electricity or electrical current, steam heat, water and gas (natural or artificial) to users or consumers.'

The original law and the original Bill used the words "domestic, commercial or industrial", which words were replaced by the words, "users or".

I would appreciate your furnishing me with an opinion immediately as to just how this amendment affects individuals, partnerships, firms or corporations of this State. In other words, will this amendment embrace a field not now covered by the law or the Bill in its original form?"

Sub-section (g) of Section 11407 of House Bill 125 defines "sale at retail" as follows:

"(g) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace:"

By this definition it will be seen that the tax is imposed only on the sale of the taxable article, when it is sold to the ultimate user or consumer and that if it is to be sold again in any form as tangible personal property the transaction is not taxable under the Act.

Section 2 of sub-section (g) of said Section 11407 of the Act reads as follows:

"(2) Sales of electricity, electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

This Section in its present form is in the same form that the sales tax act was in when it was before the Supreme Court in the case of State ex rel. Kansas City Power and Light Company vs. Smith, State Auditor, 111 S. W. (2d) 513.

In describing the business and transactions of the Kansas City Power and Light Company which the Auditor was attempting to tax under the section similar to said Section 2 supra, the court said, l. c. 513:

"Respondent is engaged in selling and furnishing electricity or electrical current, and the sole question in this case is whether it (respondent) is liable for tax on the sale of electrical

current sold to Kansas City, the city of Sweet Springs, and the city of Glasgow, where it is used to pump water for their municipally operated waterworks systems, and for tax on the sale of electrical current sold to the Kansas City Public Service Company, used in propelling its street cars over its street railway system in Kansas City, Mo., and Kansas City, Kan." * * *

Construing this Section the court at l. c. 514 said:

"Our consideration is finally narrowed to the construction of subsection (b) of section 2 A. Respondent contends that the words "domestic," "commercial," and "industrial" were intended by the Legislature to be used in their restrictive meanings, and that the electricity sales here involved were not made to consumers coming within this classification; therefore, the act does not apply. On the other hand, appellant contends that the quoted words are used in their broad and most general sense, and that it was the legislative intent to cover the sale of all electrical current."

In that case the court held that the words, "domestic," "commercial," and "industrial" were intended by the Legislature to be used in their restrictive meaning and ruled the case as follows; l. c. 515, (7)

"We have come to the conclusion that the electricity sold to the Kansas City Public Service Company, used to propel its street cars over its street car system, and the power used by Kansas City and the cities of Sweet Springs and Glasgow in pumping water, is used neither for commercial nor industrial purposes within the meaning of this act, and therefore is not subject to the tax in question."

Apparently this amendment has been made in light of the ruling made by the court in the Kansas City Power and Light

April 14, 1943

Company case. In other words, when the court ruled in that case that the Legislature used these words in their restrictive meaning, then by striking out these words the section as amended would be all inclusive. In other words, by the proposed amendment the tax would not be limited to retail sales to ultimate users or consumers of electricity, electrical current, water and gas (natural or artificial), which are domestic, commercial, or industrial consumers, but it would be imposed on all such sales, regardless of the nature of the business which used or consumed such products so long as such user or consumer are not exempt under Sections 11409 and 11453.

This amendment would not apply to transactions wherein electricity, electrical current, gas or water is sold to a municipality which is to re-sell it to users and consumers because under the definition of the term "retail sale," as defined in the act, the tax cannot be imposed until it is sold for ultimate use or consumption. The amendment would affect industrial partnerships, firms or corporations in the same manner.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB/mh

TAXATION

SALES TAX: Effect of House Amendment No. 2 to House Bill
No. 125.

April 14, 1943



Hon. Joseph A. Falzone
Missouri State Senator
25th District
Jefferson City, Missouri

Dear Mr. Falzone:

This is in reply to yours of recent date wherein you
submit and request as follows:

"On Page 7 of House Bill No. 125, Section 11409, Lines 4, 5 and 6, the following words were stricken from the Bill by the House members on Thursday, April 1st, known as House Amendment No. 2, which appears on Page 928 of the House Journal:

'such retail sales as may be made in commerce between this state and any other state of the United States, or between this state any any foreign country, and'.

Please furnish me with an opinion just as quickly as possible, advising me as to just how this amendment will affect the citizenry of this state and describe to me in detail your opinion of what retail sales now will be included in the law in the event this Bill becomes a law as amended by the aforesaid amendment No. 2.

Also advise me whether or not the adoption of this amendment in substance is the adoption of a so-called "use tax". In other words, as the Bill now reads as amended by amendment No. 2, does it embrace the elements of a "use tax"?"

April 14, 1943

Section 11409, R. S. Mo., 1939, before striking out the words included in the above amendment reads in part as follows:

"There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this State. * * * *"

This section as amended will read in part as follows:

"There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article, * * * any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. * * *"

The portion of the exemption Section 11409 not quoted is not pertinent to your inquiry.

From our research of sales tax and use tax acts, Missouri is the only state which has an exemption clause with a provision similar to the clause in Section 11409 which is stricken out by amendment No. 2.

April 14, 1943

In the litigation which this department has handled, wherein the foregoing provisions of the exemption section were claimed to be applicable, the tax payer has taken the position that any retail sale wherein interstate commerce is involved is exempted by said exemption provisions, regardless of whether or not the state is empowered to impose the tax under the provisions of the commerce clause of the Federal Constitution.

If the bill passes with this clause stricken out, then the state would be authorized to impose the tax on every retail sale, as defined in the act, regardless of the fact that such tax may effect interstate commerce, provided the imposition of the tax would not be in violation of the commerce clause of the Federal Constitution.

The case of McGoldrick vs. Berwind - White Coal Mining Company, 60 S. Ct. 391, 309 U. S. 33, 84 L. Ed. 360, was before the Supreme Court of the United States on certiorari from the Supreme Court of New York and was decided in January 1940. In that case the New York City sales tax act was before the court. The transaction sought to be taxed was a sale of coal which moved in interstate commerce. The Berwind-White Coal Company was a Pennsylvania corporation, with mines in that State but it had a sales office in the City of New York. The sales contracts were entered into in the City of New York, the coal purchased under these contracts moved from the mines of Pennsylvania to docks in New Jersey, then by barge to the consumers in New York City.

Section 2 of the New York sales tax act fixed the tax at, "two percentum upon the amount of receipts from every sale in New York." By Section 1 (e) the term "sale" was defined as "any transfer of title or possession, or both, in any manner or any means whatsoever for a consideration, or any agreement therefor." (60 S. Ct. 1. c. 390).

The court in speaking of the event at which this tax is imposed said, 1. c. 391:

"* * * It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. * * * "

Applying this ruling to the Missouri sales tax act which imposes the tax on the transfer of title or ownership,

April 14, 1943

then the event of the transfer of title or ownership would be the condition upon which the tax is imposed.

In the Berwind-White case, supra, the Coal Company contended that the imposition of the tax on the transactions therein mentioned would be in violation of the commerce clause. While commerce was involved in these transactions the court held that that of itself would not prohibit the State from imposing the tax. At l. c. 392, the court said in discussing this question:

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, 115 A.L.R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress. * *"

In speaking of certain taxes which states might not impose because they would burden commerce, the court at l. c. 393 said:

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disad-

vantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

The court in this case held that the tax could be imposed without violating the commerce clause of the Constitution even though interstate commerce is involved.

The rule, as announced by the latest decisions, seems to be that the state may impose a tax on commerce if such tax does not burden interstate commerce any more than it does intrastate.

The Supreme Court of the United States in the Western Live Stock case, 303 U. S. 250, held that those engaged in interstate commerce must bear their just share in interstate tax burdens. The Berwind-White case and the Western Live Stock case, supra, are two of the leading and latest cases on the question of the rights of the states to tax transactions in which interstate commerce is involved.

The words included in amendment No. 2 to House Bill 125, if left in the act, and if they do not violate the equality clause of the Federal Constitution, would exempt from the provisions of the retail sales tax act such transactions as are in commerce between the states, etc., even though it would not be in violation of the commerce clause of the Federal Constitution to tax such transactions.

The effect of the amendment is to place interstate retail sales, which may be taxed without violating the provisions of the commerce clause, on the same basis as the intrastate retail sales.

Your further inquiry as to whether or not the adoption of this amendment in substance is the adoption of the so-called "use tax". The sales tax act imposes the tax on the person who purchases the article or service for use or consumption. However, we do not think the act in its present form, or with the proposed amendment, would make it a "use tax". In distinguishing between a use tax and a sales tax, we find reference to cases in, volume 43 of Words and Phrases, Permanent Edition, at page 103 of the pocket insert:

April 14, 1943

"The provision of the Arkansas Retail Sales Tax Law providing that every person, as defined in the act, shall report, as a retail sale, the use or consumption by him of anything on which the sales tax has not been paid, and on which a sales tax would have been levied had the thing in question been sold at retail in the state, and shall pay the sales tax thereon, does not levy or impose a 'use tax,' but rather imposes a 'sales tax.'"

* * *

In the case of a 'use tax' there is no change of possession of the property, no change of ownership, and the owner pays the tax, which is an excise or exaction charged because of the owner's privilege to exercise or assert some of the elements of ownership over the property. Mann v. McCarroll, 130 S. W 2d 721, 726, 198 Ark. 628."

Applying these rules to the Missouri sales tax act, it is the opinion of this department that the act itself, or as amended by amendment No. 2, would not make it a "use tax".

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTERICK
Attorney General

TWB/mh

INSURANCE: Three questions relating to the authority of the State to insure.

June 18, 1943

6/29



Honorable Joseph A. Falzone
Missouri Senate
Jefferson City, Missouri

Dear Senator Falzone:

We are in receipt of your letter of June 18, 1943, requesting an opinion of this department on behalf of the Senate Appropriations Committee. Your letter of request reads as follows:

"Please furnish me forthwith, your answers to the following questions and your opinion in connection therewith:

"1. Is there any statutory provision prohibiting the expenditure of state funds for insurance premiums?

"2. In the absence of a specific statutory provision providing for certain insurance or certain surety bonds, does any state department, appointed or elected, have the right to expend funds for this purpose?

"3. Is it your opinion that the clause 'insurance and insurance bond premiums' which appears in numerous appropriation bills under the heading of 'operations', may be construed as statutory authority to expend funds for insurance premiums?"

In answer forthwith to question one, this department has been unable to find any express statutory provision prohibiting the expenditure of State funds for insurance premiums.

In answer to your second question, Section 48, Article IV, Missouri Constitution, provides:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Section 19, Article X, Missouri Constitution, provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Section 13043, R. S. Mo. 1939, provides:

"No warrant shall be drawn by the auditor or paid by the treasurer, unless the money

has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

In order for State money to be expended by a department of the State, an appropriation for that purpose must be made by the Legislature, in view of the above quoted authority.

The right of a state department to expend state money for insurance may arise, first, by authority of express statute, and, secondly, by necessary implication as one of the incidental powers of the maintenance of such department. Whether or not a specific state department has statutory authority to purchase insurance may be determined by consulting the index of the Missouri Revised Statutes. Whether or not a specific state department has, as an incidental power of maintenance, the power to purchase insurance, may be determined, first, by the nature of the department, and, secondly, by considering upon what the insurance is to be carried.

On the question of the powers and duties which are incidental to maintenance, we find the rule to be stated in the following authorities and cases.

In Encyclopedia of Insurance Law, Couch, Volume I, Section 226, it is said:

"And if a city charter empower it to maintain public buildings, the city acquires, as incidental to the power thus granted the right to contract for insurance against their loss or destruction."

In the case of Clark School Township v. Home and Insurance Trust Company, 51 N. E. 107, 109, the court said:

"We are of the opinion that, under the statutory provision placed upon the trustee the duty of caring for and managing the school property, he has

such implied authorities that, in the exercise of his discretion, he may make reasonable expenditures from the special school revenue, by way of procuring insurance on such property against fire."

In the case of Walker v. Linn County, 72 Mo. 650, the court held that county courts have power to enter into contracts for insurance of county buildings against fire or lightning.

And in 59 Federal, page 741, the rule is stated that:

"Where a power is given by a statute, the courts should as a rule hold that anything necessary to make it effectual is given by implication."

It would seem that under the above quoted authorities, the purchasing of insurance by a state department might be considered a proper exercise of the power to maintain, as incidental thereto, even in the absence of an express statute giving such right or authority to the particular department. However, no state money can be expended by a department for insurance, except by implication, unless said money is appropriated for that specific purpose. In the absence of such an appropriation such money would have to come out of some other fund, such as a fund for miscellaneous purposes or a fund which did not exist by virtue of a legislative appropriation.

Your third question is answered in the negative.

Appropriation bills are not such legislative enactments as may be considered as carrying statutory authority.

Section 28, Article IV, Missouri Constitution, provides as follows:

"No bill (except general appropriation bills, which may embrace the various

subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

In the case of State v. Smith, 75 S. W. (2d) 828, 335 Mo. 1069, the following is taken:

"It cannot be said that the act appropriating \$3,000 from the general revenue fund to the board of barber examiners' fund amounted to an amendment of section 13525, R. S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate \$3,000 from one fund to another. It reads as follows:

"There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand (\$3,000.00) dollars to the Board of Barber Examiners Fund." (Laws 1933-34, p. 12, Sec. 12B.)

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation

June 18, 1943

of money are two entirely different and separate subjects. State ex rel. Mueller v. Thompson, State Auditor, 316 Mo. 272, 289 S. W. 338."

Under the authority of the above quotation a mere appropriation bill carrying the clause "insurance and insurance bond premiums," does not amount to statutory authority for the department to which the appropriation bill applies, to purchase insurance. To the same effect is State v. Gordon, 236 Mo. 142.

CONCLUSION

It is, therefore, the opinion of this department that (1) there is no statutory prohibition against a department of the State to purchase insurance; (2) that no State money can be expended by a department of the State of Missouri for insurance unless said State money is appropriated for that specific purpose, except where such expenditures can be condoned on an exercise of some incidental power of the department; and (3) that appropriation bills which contain the clause "insurance and insurance bond premiums," are not such statutory enactments as to give a department statutory power thereby to purchase insurance.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WCB:EG

SUPERINTENDENT
OF SCHOOLS:

Shall not engage in teaching or any
other employment that interferes with
the duties of his office.

July 27, 1943

Mr. Roth H. Faubion
Prosecuting Attorney
Barton County
Lamar, Missouri



Dear Mr. Faubion:

This will acknowledge receipt of your letter in which
you request an opinion. Omitting caption and signature,
this request is as follows:

"If possible I would like a construc-
tion of Section 10617, R. S. Mo., 1939.

"Owing to the shortage of teachers, and
the like, the County Superintendent of
the county has been employed as Super-
intendent of the schools of the City of
Lamar. This man by having a Deputy
County Superintendent will be fully
able to comply with the provisions of
this section, unless it might have been
the intention of the legislature that
by the first sentence of said section
10617, it was intended that said County
Superintendent should not engage in any
other remunerative employment.

"I would appreciate an answer very soon
if possible as it will not be long be-
fore the schools open and teachers, es-
pecially Superintendents are tough to
sign."

Section 10617 R. S. Mo., 1939, provides in part as
follows:

Mr. Roth H. Faubion

-2-

July 27, 1943

"During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law. * * "

We quote that section of the statute which is useful in the determination of the question raised in your letter. This section of the statute seems to be clear, unambiguous and leaves no room for interpretation. The obvious intention of the Legislature is that the county superintendent of schools shall not engage in teaching or any other employment.

CONCLUSION

From our reading of the statute as it pertains to the office of the superintendent of schools, we conclude that a superintendent of schools, during his term of office, shall not engage in teaching or in any other employment.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

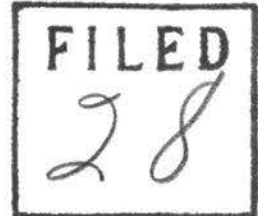
ROY McKITTRICK
Attorney-General

SCHOOL FUND
MORTGAGE:

Statute of Limitations will run against the county in a school fund mortgage after a period of twenty years has elapsed, but the obligation remains in force as against sureties.

July 29, 1943

7/27



Mr. Roth H. Faubion
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Mr. Faubion:

This will acknowledge receipt of your letter of recent date, the exact nature of which, omitting caption and signature, is as follows:

"I would appreciate an opinion on the following:

"'A' borrowed money from the capital school fund of the county. 'B' and 'C' are his bondsmen or security.

"The school fund mortgage running more than twenty years from the due date of the last payment on the face of the instrument thereby, becoming outlawed under the twenty years statute of limitations. Under such circumstances can the bondsmen or security be collected from, or is their obligation outlawed also. In this case no affidavit was filed prior to the running of the statutes of limitation."

At the outset it will be necessary to assume certain things because they were not touched upon in your letter. There is nothing to show that during the twenty years of the existence of this loan the surety did anything about

July 29, 1943

payment by principal to the creditor nor that he requested a foreclosure at that time. Your letter does not disclose whether the status between creditor, principal and surety has changed within this twenty years. Therefore, we are assuming that there was no interest payment, no extension, no alteration of the contract, and that no notice had been filed by surety with the creditor requesting the foreclosure.

The general rule that the Statute of Limitations does not operate against a sovereign and that a county being a political subdivision of the State and the rule would therefore not apply is well established in this State. The decision in which the rule was established that the maxim, "Nullum tempus occurrit regi" did not apply to a political subdivision of this State is found in *Emery v. Holt County*, 132 S. W. 2d 970, 1. c. 971, in which Judge Gantt has this to say:

"Under the common law the maxim 'Nullum tempus occurrit regi' did not apply to political subdivisions of the state. It applied only to the state. *County of St. Charles v. Powell*, 22 Mo. 525, 66 Am. Dec. 637. In *Callaway County v. Nolley*, 31 Mo. 393, 397, we ruled as follows:

" * * * * *

"Furthermore, at an early date the maxim 'Nullum tempus occurrit regi' was abolished in this state. Sec. 10, Art. II, p. 75, Laws of Mo. 1848-49. It is now Sec. 888, R. S. 1929, Mo. St. Ann. Sec. 888, p. 1171, which follows:

"The limitations prescribed in articles 8 and 9 of this chapter shall apply to actions brought in the name of

this state, or for its benefit, in the same manner as to actions by private parties.'

"In State ex.inf. Attorney General v. Arkansas Lumber Co., 260 Mo. 212, 285, 169 S. W. 145, 168, we ruled 'that this section makes applicable to the state every general limitation in our law'.

"Defendants argue that it should be against public policy to permit school funds to be lost by negligence or misfeasance of officers.

"The legislative enactments of this state and the decisions of the courts construing the same determine the public policy of the state. In this situation the argument here made as to public policy should be addressed to the legislature.

"The cases from other jurisdictions cited by defendants are ruled under the statutory and constitutional provisions of those states. For that reason they should not be followed in determining the question under consideration. We think the limitations provided in Sec. 865 apply to a county school fund mortgage. The judgment should be affirmed."

We, therefore, conclude that the Statute of Limitations would apply in actions brought on by creditor against the principal and that the political subdivision could no longer proceed against the principal, "A" in this instance.

The question now arises whether the Statute of Limi-

tations is available to the surety in the present instance. Article XI, Section 10, page 156c of the Constitution of Missouri, which we do not feel is necessary to be set out in detail, provides that in school fund mortgage loans, in addition to the note and mortgage given by the principal, additional surety may be required. See also Sec. 10384 R. S. Mo., 1939.

We have previously seen that the decisions hold that the Statute of Limitations does not refer to obligations given for public use. Authority for this rule may be found in Cedar County v. Johnson, 50 Mo. 225, Jasper County v. Shanks, 61 Mo. 332, Johnson County v. Gilkeson, 70 Mo. 645. In this latter case, one involving principal and surety on a school fund mortgage loan, the Court had the following to say:

"This was a suit against Gilkeson and Brammer, securities for one Swan on a bond given the county for the use of school township number 44, range 28, in 1866. The defense on the part of Brammer was, that he gave notice to the plaintiff to sue or to foreclose a mortgage on Swan's property, and by reason of the neglect of the county to do either within the thirty days after the notice, the debt was lost so far as the principal was concerned by his insolvency after the notice. * * * * * As this court has already decided this question in two cases, (Cedar Co. v. Johnson, 50 Mo. 225, and Jasper Co. v. Shanks, 61 Mo. 332,) it is useless to look into the long list of authorities elsewhere cited by the counsel for appellant. Whether this right claimed here is under our statute or at common law, the result is the same, since the court has de-

clared that 'one who becomes a surety on such public bonds must hold himself ready to pay it, if the principal fails, and if he fears his insolvency, he should pay the obligation and collect it, if he can, of his principal; but he will not be discharged on account of the neglect of public officers.'

See also Section 1017 R. S. Mo., 1939, which cites the above case.

It is reasoned in these cases that no person has any specific interest in the collection of such a bond, and one who having become a surety in such a situation must hold himself ready to pay it if the principal fails. He will not be discharged on account of the neglect of public officers. The principle is well recognized that in the present instance the surety by application to a court of equity could compel the creditor county to foreclose because there was danger that the principal would not be able to pay this obligation. It is further the theory of the courts that county courts as such have a multitude of duties and are less likely to pay personal attention to all of the great volume of business transacted in such court. The surety is estopped to raise the point since by his own neglect he has failed to protect himself.

Looking now to some of the decisions we find in *Marion County v. Moffett*, 15 Mo. 604, 1. c. 606, Scott, J., had this to say:

"The school lands were vested in the State, in trust for the benefit of the inhabitants of the township in which they are respectively situated. The State vested in the County Courts

July 29, 1943

the management of this trust. Those courts are the agents of the State for this purpose. The principle, that the State is not affected by the laches of her agents, was sanctioned by this court in the case of *Park v. State*, 7 Mo. R.

"The doctrine, that laches is not imputable to the government, is founded on considerations of policy. The State can only act through her officers, and her transactions are so multiplied and her agencies so numerous, that great losses must result from maintaining that she is liable for the laches of those to whom she is compelled to intrust the management of her pecuniary concerns. The provisions of the law above cited, were intended only for the regulation of the conduct of the officers to whom was confided the care of the school moneys, and to secure those moneys from loss. They are merely directory and form no part of the contract with the surety. The surety has the same means of forming a judgment of the fidelity of the public agents as the State, and if he reposes confidence in them and is deceived, he cannot expect that the consequences of their neglect shall be visited on the State. The case of *the People v. Janson*, 7 Johns. R., relied on by the plaintiff in error, has been overruled. (a) The other Judges concurring the judgment will be affirmed."

See also *County of St. Charles v. Powell*, 22 Mo. , 1. c.

Mr. Roth H. Faubion

7
-4-

July 29, 1943

528, Ray County v. Bently, 49 Mo., l. c. 243, Washington
County v. Boyd, 64 Mo., l. c. 183.

At 50 C. J. 188, paragraph 311, which touches upon the
discharge of a surety, we find the following language:

"The general rule that a surety is
discharged when the liability of his
principal is extinguished does not
apply when the extinction is caused
by operation of law, and not by the
act of the creditor, and the defense
is personal to the principal, but
the surety remains liable. * * * * "

CONCLUSION

We conclude from a reading of the statutes and author-
ities quoted that in the present instance the Statute of
Limitations will bar any action against the principal "A"
on the note and mortgage but that the statute is inopera-
tive as against the sureties "B" and "C". We further
conclude that the county may proceed against sureties on
the obligation even though the principal debt between "A"
and creditor county has been extinguished.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:FS

PROBATION OFFICER: Section 9708, R. S. Mo. 1939, repealed by implication.

October 12, 1943

10/16



Honorable Roth H. Faubion
Prosecuting Attorney
Lamar, Missouri

Dear Mr. Faubion:

The Attorney-General acknowledges receipt of your letter of October 8, 1943, in which you request an opinion as follows:

"I have been studying sections 9708, 29718, 9718 inclusive. Also sections 9719 and 29732 inclusive of the revised statutes of Missouri 1939, concerning the appointments and salaries of probation officers, and of superintendents of public welfare.

"The cases cited seem to be in variance with each other as to whether section 9719 etc., repeals section 9708 entirely or to a limited degree only, or if at all. I wish an opinion on that question.

"In addition to the above information I would like an opinion as to whether the circuit court must, or may approve the appointment of a superintendent of public welfare under section 9719. It appears plainly that section 9720 precludes anyone but the county court in fixing the salaries of the county superintendent of public welfare."

What is published in the Revised Statutes of Missouri for 1939, as Section 9708, Article 10, Chapter 56, was published

as Section 14171, R. S. Mo. 1929, and this section had been Section 1144, R. S. Mo. 1919. The section was carried in the 1929 and 1939 revisions without change or amendment from the form in which it was carried in the 1919 revision.

In 1922 the Supreme Court of Missouri, en banc, all judges concurring, in the case of Poindexter v. Pettis County, 246 S. W. 38, 1. c. 40, held Section 1144, R. S. Mo. 1919, to have been repealed by Section 1 of Senate Bill 153, enacted by the Fifty-first General Assembly and published in Laws of Missouri, 1921, at page 586. In holding Section 1144, R. S. Mo. 1919 to have been repealed, the court used the following language:

"And under the decisions of this state, as was held in the case of State v. Roller, 77 Mo. 120, that--

"'A statute revising the whole subject-matter of a former statute and evidently intended as a substitute for it, although it contains no express words to that effect, repeals the former.'

"The following cases also decide the same point: State v. Patterson, 207 Mo. 129, loc. cit. 145, 105 S. W. 1048; Yall v. Gillham, 187 Mo. 393, loc. cit. 405, 88 S. W. 125; Delaney v. Police Court, 167 Mo. 667, loc. cit. 616, 67 S. W. 589; Meriwether v. Love, 167 Mo. 514, loc. cit. 521, 67 S. W. 250; Kern v. Legion of Honor, 167 Mo. 471, loc. cit. 484, 67 S. W. 252; State v. Summers, 142 Mo. 586, loc. cit. 591, 44 S. W. 797.

"Under the rulings announced in these cases, unquestionably it was the intention of the Legislature by the act of 1921 to repeal section 1144, R. S. 1919."

Section 1 of Senate Bill 153, enacted by the Fifty-first General Assembly, was printed in the 1929 revision of

Oct. 12, 1943

the statutes as Section 14182 and is now Section 9719,
Article 11, Chapter 56, R. S. Mo. 1939.

Conclusion.

Following the decision in the Poindexter case, supra, it is the opinion of the writer that what is published as Section 9708, Article 10, Chapter 56, R. S. Mo. 1939, was repealed more than twenty years ago and has had no effect since the Poindexter decision.

The circuit court is given no power to approve the appointment of a superintendent of public welfare provided for by Section 9719, R. S. Mo. 1939.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

VOJ:EG

COUNTY COURT: Construction of Section 10384A relative
to procedure in determining true value
SCHOOLS: of property.

December 8, 1943

12/9
FILED
28

Honorable Roth H. Faubion
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 25th, requesting an official opinion from this department, which reads:

"Controversy has arisen between the members of the county court of Barton County, regarding the meaning of certain parts of Senate Bill 13 and more particularly in Section 10384A on page 881 in the Laws of Missouri, 1943. Starting with the second sentence of said section:

"Said appraisers shall not be related in any degree to the party seeking the loan, and shall have no interest therein, and they shall make and file a written report of their appraisement, under oath, in the office of the county clerk, which report shall be used by the county court in arriving at the true value of the premises that will be encumbered if the loan is made."

"The point in question is this, does the above statement in the law make it mandatory for a county court to accept the report of the appraisers as final in either making or refusing a loan, or does the county court still retain it's

authority to be the final judge of the making or the refusal of the loan. The particular words in the law and contained in said section are these, 'Which report shall be used by the county court in arriving at the true value of the premises that will be encumbered if the loan is made.'

"If possible I would like your opinion on the above matter though I am aware that it has not been construed by any court."

The words, "Which report shall be used by the county court in arriving at the true value of the premises that will be encumbered if the loan is made," if intended by the Legislature to prevent the county court from exercising any discretion in determining the true value of the premises certainly did not choose language so as to avoid ambiguity. If the intention of the Legislature was that such report should be taken as the true value without anything further, then we must construe the words "in arriving at the true value" to be surplusage and meaningless. There is a rule of statutory construction that each and every word of a statute should be harmonized, if possible, and given some meaning; also, that in construing statutory provisions the court will not construe same so as to accuse the Legislature of enacting a meaningless provision, if same can be reconciled with other provisions of the Act and construed so as to have some meaning.

In the case of State v. Allen, 128 S. W. (2d) 1040, 1. c. 1043, the court said:

"We adopt the reasons assigned by Commissioner Cooley in overruling the Klasing opinion, which are as follows:

"Statutes are to be construed, if possible, so as to harmonize and give

effect to all their provisions,
Gasconade Co. v. Gordon, 241 Mo.
569, 145 S. W. 1160. * * * * *

Therefore, we are of the opinion that such provision should be construed so that it shall not be mandatory that the county court accept as true the appraisal and report of the appraisers; but that the county court shall consider said appraisal along with other methods and procedures of determining the true value of said property, and great weight should be given such appraisal and no other figure should be used as the true value, unless the county court be convinced that the appraisal is erroneous, if for no other reason than as a protection to the county court from future criticism in determining the true value of said property. After all, it is not so easy in these times to determine the true value of property, and very seldom will persons be in agreement as to the true value.

Similar provisions are included in other acts in the statutes, but the writer fails to find wherein any are construed by the courts. Such are found in a new section of the Nonintoxicating Beer Act as amended by the Sixty-second General Assembly, found in Section 4996a, Laws of Missouri, 1943, page 615, which reads in part:

"If the Court shall find upon the hearing that the offense or offenses charged in the complaint have been established by the evidence, the Court shall order the suspension or revocation of the license but, in so doing, shall take into consideration whatever order, if any, may have been made in the premises by the Supervisor of Liquor Control. * * * * *

(Underscoring ours.)

Then the Act later adds:

"* * * and the suspension or revocation of a license as herein provided shall be

in addition to and not in lieu of any other revocation or suspension provided by this Act."

All of which indicates the Legislature, in such case, never intended by the use of the words "shall take into consideration whatever order, if any, may have been made in the premises by the Supervisor of Liquor Control," to prohibit the court from suspending or revoking said license, notwithstanding the fact the Supervisor of Liquor Control may have already suspended or revoked said license, but only that the court should take into consideration such punishment already invoked by said Supervisor of Liquor Control.

Furthermore, had the Legislature so intended this report appraising said property to be taken as final, and no discretion whatsoever to be exercised by the county court in the matter, it would have been an easy matter, for the Legislature could have used words as may be found in the sale of real estate by the guardian or curator of a minor, which reads in part, "but in no case shall the same be sold for less than three-fourths of its appraised value," or such similar words as, in no case shall the valuation of said real estate exceed the appraised valuation, or, the county court shall consider the appraisal value as the true value of said real estate and be governed accordingly in making any loans on said real estate.

CONCLUSION

Therefore, it is the opinion of this department that such words as found in Section 10384A, Laws of Missouri, 1943, which read "which report shall be used by the county court in arriving at the true value of the premises that will be encumbered if the loan is made," only means that the county court shall give such appraisal and report grave consideration, but by no means does it make it mandatory

upon the county court to consider such appraisal and report as the true value of such property, but the county court shall exercise sound discretion in arriving at the true value of said property in whatever manner they deem advisable.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

ARH:CP

APPROVED:

ROY MCKITTRICK
Attorney-General

COUNTY COLLECTOR: County Collector should not deposit his
COMMISSIONS: commissions on taxes with taxes in the
County Treasury.

February 5, 1943

Mr. James A. Finch, Jr.
Assistant Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department as follows:

"Under Section 11056, R. S. 1939, the county court is authorized in counties having a population of less than seventy-five thousand to require the county collector to make daily deposits of collections, in a depository selected by the county court, to be credited to the county collector's fund. Cape Girardeau County has less than seventy-five thousand inhabitants, and the county court has selected a depository in which the collector is required to deposit daily collections to the county collector's fund.

"In the latter portion of said Section 11056 it is provided:

"The collector shall not check on such 'County Collector's Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

"When the collector deposits all the collections in the county collector's fund he deposits his commissions, and the statute does not specifically authorize the collector to draw a check to withdraw his commissions or against his commissions for the payment of deputy hire, clerical help or for any other office expense. Would be pleased to have your opinion at your earliest convenience as to your construction of this section and to have you advise how the county collector may check against this fund in order to pay his commissions or to check against his commissions due for the purpose of paying office help, deputy hire, etc."

I believe you have overlooked the provisions of Section 11098, R. S. Mo. 1939, when considering your question. You will note that by this section you are required to file with the County Clerk a statement of the various taxes which you collect and to pay these taxes into the County Treasury. You will note that this section provides that you do not pay your commissions into the County Treasury.

In construing the provisions of this section relating to the Collector's duties, the court, in *Hethcock v. Crawford Co.*, 200 Mo. 170, 175, said:

"* * * Thus, if we look to other provisions of the statutes it will appear that plaintiff's duty was to report his tax collections and to retain his five per cent commissions--the language of the statute being (sec. 9255) that the collector 'shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all ... county ... road and municipal taxes ... by him collected during the preceding month, and shall, on or be-

fore the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively ...'

"In addition to the precise provisions of the last-quoted section, there are cognate sections providing for settlements; and the manifest theory of the statutes is that the collector report his commissions in his settlements, and that it is his privilege and duty to keep back the commissions allowed by the law on tax collections and not the county court's duty to see that he does. The county court does not prepare his settlements, nor does it furnish the data therefor. The county court does not allow his commissions; it has no lot or part in that; the law allows them on settlements and statements made by him--the court being merely the representative or fiscal agent of the county, charged with the duty to see to it that the public is protected. * * * * *

This statute is plain and unambiguous and the court in the Hethcock case, supra, has given it a construction which supports our conclusion.

CONCLUSION

From the foregoing it is the opinion of this department that the Tax Collector should not deposit his commissions with the County Treasurer and that there is no provision other than the provisions of Section 11056, supra, to withdraw tax monies from the county treasury.

Respectfully submitted,

TWB:CP

APPROVED:

TYRE W. BURTON
Assistant Attorney-General

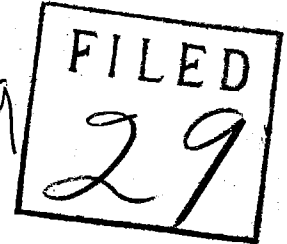
ROY McKITTRICK
Attorney-General

INCOME TAX:
DEPARTMENT OF COLLECTION
AND PAYING RETURNS;

Collection of income taxes and the
necessity of filing return by members
of the armed forces outside the United
States if such person's ability to pay
such tax is materially impaired or if
he is not in a position to make a re-
turn by reason of such service.

February 16, 1943

Hon. James A. Finch
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Mr. Finch:

We acknowledge receipt of your letter of February 1st, last, requesting an opinion, which letter is as follows:

"Wish you would kindly advise whether or not it is the opinion of your office that those in the armed services of the United States who are out of the continental United States and for military reasons cannot disclose their location may delay, without penalty, the filing of State income tax returns, as is provided for making delayed Federal income tax returns.

"There are a great many State income tax payers who are now in foreign service who cannot, for military reasons, make a return, because to swear to the return would give their location and as a practical proposition it is difficult to know how to make the return, and it would seem to be a rather strict rule to require them to pay penalty or interest because of inability to make a return."

Section 100 of the Federal Soldiers' and Sailor's Relief Act of 1940, is as follows:

"In order to provide for, strengthen, and expedite the national defense under the emergent conditions which

are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

Section 513 of the Federal Soldiers and Sailors Relief Act of 1940, provides for the deferment of income tax collection and is as follows:

"The collection from any person in the military service of any tax on the income of such person, whether falling due prior to or during his period of military service, shall be deferred for a period extending not more than six months after the termination of his period of military service if such person's ability to pay such tax is materially impaired by reason of such service. No interest on any amount of tax, collection of which is deferred for any period under this section, and no penalty for nonpayment of such amount during such period, shall accrue for such period of deferment by reason of such nonpayment. The running of any statute of limitations against the collection of such tax by distraint or otherwise shall be suspended for the period of military service of any individual the collection of whose tax is deferred under this section, and for an additional period

of nine months beginning with the day following the period of military service. The provisions of this section shall not apply to the income tax on employees imposed by section 1400 of the Federal Insurance Contributions Act."

The Soldiers' and Sailors' Relief Act of 1940 is almost identical with the Act of 1918, and the Act of 1918 and similar acts prior thereto were all held to be constitutional.

On March 16, 1802, Congress passed an Act (2 Stat. 136) which prohibited the arrest of any soldier for a debt of less than \$20 contracted before enlistment, or for any debt contracted after enlistment. Similar legislation was enacted during the Mexican War. During the Civil War the Act of March 3, 1863 (12 Stat. 755) and the Act of May 11, 1866 (14 Stat. 46) extended protection to all persons for acts done under military authority in conducting the war. During the World War the Soldiers' and Sailors Civil Relief Act of 1918 (40 Stat. 440) was passed. Similar state statutes have been enacted. *Granger v. Luther*, (1920) 42 S. D. 636, 176 N. W. 1019; *Studdt v. Trueblood*, (1921) 190 Iowa 1225, 181 N. W. 445; *Thress v. Zemple*, (1919) 42 N. D. 599, 174 N. W. 85. None of these statutes have been held unconstitutional, either totally or partially, by the courts.

With regard to the Federal Civil Relief Act of 1918, the Supreme Court of Oregon in *Pierrard v. Hoch*, (1920) 97 Ore. 71, 191 Pac. 328, following the principle laid down by Chief Justice Marshall in *McCulloch v. Maryland*, (1819) 4 Wheat 316, that means which are appropriate and plainly adapted to carrying out the ends sought by the constitution are constitutional, said: "It is clear that under the war making power the national legislature has the authority to provide for the protection of its soldiers, to relieve them from anxiety and annoyance respecting litigation at home, and to make a general rule applicable alike to all those engaged in its service." In *Kuehn v. Neugebauer*, (1919, Tex. Civ. App.) 216 S. W. 259, the court said that, there is "no authority denying validity of this (Act of 1918) or any similar statute." The courts throughout many of the several

states have adopted the view that it is a legitimate function of Congress, under its power to declare war and to maintain armies, to enact laws designed to protect its soldiers and sailors engaged in the prosecution of a war, and thus to maintain the morale of its armies.

The courts have similarly held that such an act should be liberally construed. The reason for such liberal construction is clearly stated in the case of *Kuehn v. Neugerbauer* (Tex. Civ. App.) 216 S. W. 259, as follows:

"* * * a remedial statute, enacted by Congress for highly important national ends, and * * * its provisions must be liberally interpreted to ascertain the intent of Congress and give effect to that intent."

There also seems to be no doubt but what Congress in the exercise of its power to maintain an army and navy, can control the procedure in the state courts. *Konkel v. State*, (1919) 168 Wis. 335, 170 N. W. 715; *Bell v. Baker*, (Tex. Com. App. 1924) 260 S. W. 158; *Clark v. Mechanics' American Nat'l Bank*, (1922) 282 Fed. 589, citing *Stewart v. Kahn*, (1870) 11 Wall. 493 and *Erickson v. Macy*, (1921) 231 N. Y. 86, 131 N. E. 744; *Kosel v. First Nat'l Bank of Ashley*, (1927) 55 N. D. 445, 214 N. W. 249. In *Konkel v. State*, supra, the court decided that regulation in respect to the service of civil process upon persons in the military service is of a purely national character, and, therefore, the orderly administration of army and navy affairs requires that such regulation should be uniform throughout the United States. Nor is there any doubt but what the federal statute will supersede any similar state law, by virtue of Article 6, of the federal Constitution. *Konkel v. State*, (1919) 168 Wis. 335, 170 N. W. 715; *Pierrard v. Hock*, (1920) 97 Ore. 71, 191 Pac. 328. See also: *Selective Draft Law Cases*, (1918) 245 U. S. 366, 38 Sup. Ct. 159; *Sturges v. Crowninshield*, (1819) 4 Wheat. 122; *Savage v. Jones*, (1912) 225 U. S. 501, 32 Sup. Ct. 715.

It was held in the case of *Wenatchee Produce Company v. Great Northern R. R. Co.*, (D. C. Wash. 1941) 25 Fed. 784, that Congress may extend the statute of limitations as a war measure.

February 16, 1943

The following paragraph appears in Commerce Clearing House, Inc., War Law Service, Paragraph 19,051.23:

"The payment of any taxes or assessments, general or special, falling due during the period of military service in respect to real property owned and occupied for dwelling, agricultural or business purposes by a person in military service or his dependents may be postponed until six months after the termination of the period of military service, by filing the prescribed affidavit with the collector of taxes. If the property has been sold or forfeited for taxes, it may be redeemed within six months after the termination of military service, by the payment of the amount of back taxes together with 6% interest. Other penalties are to be waived. (Selective Service System, Release N. 83, October 23, 1940.)"

On April 13, 1942, by letter, the State Auditor ruled that the party in military service must file a request in writing with the State Auditor, in order to secure deferment under the act above quoted. Of course, exceptions will probably be made to this rule in cases where soldiers are not in this country, and are not in a position to make such a request. Section 513 above quoted, gives the right to deferment only in cases where "such person's ability to pay such tax is materially impaired by reasons of such service." Proof of service can be obtained by the soldier under Section 601 of the Soldiers and Sailors Civil Relief Act of 1940, which is as follows:

"(1) In any proceeding under this act a certificate signed by the Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army of the United States, signed by the

Chief of the Bureau of Navigation of the Navy Department as to persons in the United States Navy or in any other branch of the United States service while serving pursuant to law with the United States Navy, and signed by the Major General Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced be prima facie evidence as to any of the following facts stated in such certificate:

"That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and the place where such person died in or was discharged from such service.

"(2) It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificates to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same."

Section 3804 of the Internal Revenue Act provides for the postponement of the performance of a number of acts by reason of war including the filing of income tax returns and the payment of same. This section relates only to federal taxes. However, it is probable that a similar provision might be passed by this session of our state legislature, or a policy may be adopted that will give relief to persons in military service who are not in a position to make and file income tax returns.

Therefore, it is our opinion that persons in the armed services will not be required to pay interest and penalties for a failure to comply with the income tax laws of this state, if they furnish proof that their ability to pay such tax is materially impaired by reason of military service. As the Missouri Laws now exist, no exception is made for the filing of income tax returns by persons in the armed services, but it is probable that some relief will be granted in this respect to persons in the armed services.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:NS

* CLERK OR CIRCUIT COURT: Temporary military service does not vacate office:

April 3, 1943

4-6
FILED

29

Honorable Bernard T. Flannery
Clerk of Circuit Court
County Court House
Kansas City, Missouri

Dear Mr. Flannery:

The Attorney General wishes to acknowledge receipt of your letter of April 1, 1943, in which you request an opinion as follows:

"In view of the fact that I will be leaving Kansas City within the next two weeks for the Armed Forces, it is our desire to have an opinion from your office pertaining to the status of my term as Circuit Clerk.

The opinion is desired for our files and for the protection of my Chief Deputy, Mr. James R. (Bob) Byrnes, whom I am leaving in charge and to act in my stead."

In your letter you fail to state by what method you will enter the armed forces, whether by induction under the Selective Service Law, by voluntary enlistment, by acceptance of a temporary commission, or by reason of being on the reserve and called to active duty. This lack of information precludes our giving a positive and unqualified opinion upon the question asked. However, we are assuming that you are entering the armed forces temporarily for the duration of the existing emergency and are answering the question on that assumption.

The question of what effect entrance into the armed forces for the present emergency has upon the tenure and title to an office has been passed upon twice by the Supreme Court of this State. The most recent case is the case of State ex inf. McKittrick vs. Wade Wilson, reported in 186 S. W. Reporter, (2nd) series at page 599. This case involved the title to the office of Circuit Clerk of Henry County.

April 3, 1943

The elected clerk, John Wall, had entered the army under the Selective Service Law and was stationed out-side of the State of Missouri. The Governor, deeming a vacancy to exist by reason of such absence from the State, appointed Wade Wilson as Circuit Clerk of Henry County, and this office brought an ouster proceeding against Wilson charging him with usurping the office. It is desired to call to your attention two brief quotations from this case, l. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

and the second one, l. c. 502, as follows:

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. Therefore, the office was not vacant and the appointment of respondent was unauthorized."

If your entering into the armed service should be under the Selective Service Law the Wilson case rules specifically.

The first case decided by the Supreme Court involving the question was the case of State ex rel. McGaughey vs. Grayston, reported in volume 163 S. W. Reporter, (2nd) series, page 335. This case involved the title to the office of Judge of the Circuit Court of Jasper County. The Honorable Ray Watson, one of the Judges of the Circuit Court of Jasper County, was also a Colonel in the National Guard. When the National Guard was called to active duty by the Federal Government, Judge Watson left the State of Missouri in command of his regiment. The members of the bar of Jasper County, from time to time, elected a special

Judge to sit for Judge Watson. This case was a prohibition suit brought to prohibit Charles M. Grayston, who had been elected Special Judge on one occasion, from holding court. The petition charged that the Special Judge had no jurisdiction to try the case.

The decision was written by Judge Douglas and from the decision in this case, attention is called to the following quotations from, l. c. 337 and from l. c. 338.

"Historically the "Militia" or "militiamen" have been held to comprehend every temporary citizen-soldier who in time of war or emergency forsakes his civilian pursuits to enter for the duration the active military service of his country. The term "militia" was not used as restricted to the National Guard. Its early usage applied to each and every able-bodied citizen between the ages of 18 and 45. By our present Constitution it is the same today.

Article XIV, Sec. 4 of our Constitution Mo. R.S.A. provides: "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

When Judge Watson was ordered into Federal service as Colonel of the Missouri National Guard was he then "holding an office of profit under the United States" within the meaning of this provision? It is our conclusion, and we so decide, that this provision was never intended to apply and does not now apply to the militiaman who enters the service of his country in time of emergency or war."

* * * * *

"The separate identity of the militiaman as distinguished from the professional soldier who makes up the Regular Army was carried on long after the adoption of this constitutional provision and was recognized and

observed in the Civil War and in the Mexican Border Service in 1916 and in the first World War. This was also the case when, in an effort to avoid the restrictions on the use of the militia units, the "National Volunteers" were called for the Mexican War in 1846-8 and the Spanish-American War in 1898. In the war with Spain the Missouri militia units volunteered en masse and each unit of the militia became the identical unit in the volunteer service. In the Mexican War, Colonel Doniphan led a large number of Missouri troops on one of the most remarkable expeditions in modern military history.

It must follow that the provision before us has no application to a militiaman even though he is employed in the service of the United States during times of emergency or war."

There have been numerous cases in other States where similar questions have been passed on but as pointed out in the Wilson case, supra in l. c. 502, the decisions from other States are not particularly helpful because of the different statutory enactments and constitutional provisions. For that reason, this opinion is based solely upon the two Missouri cases mentioned herein.

A careful reading of the two cases brings the conclusion that temporary service in the armed forces during the existing emergency for an indefinite period does not have the effect of vacating an office under the statutes and decisions in Missouri.

CONCLUSION

If your entrance into the army, and service therein, is purely temporary and you are not contemplating permanently becoming a member of the regular establishment of the United

Hon. Bernard T. Flannery

-5-

April 3, 1943

States army, but are merely contemplating the performance of the patriotic duty, which every citizen owes to our Government during the present emergency, it is the opinion of this office that such service will not affect the title or tenure of your office for the term for which you were elected.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ:mh

TOWNSHIP: Authority of Township Board to require an audit of road and bridge moneys for two years preceding April, 1943.

6
July 23, 1943

Honorable Andrew Field
Prosecuting Attorney
Caldwell County
Hamilton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 16, 1943, which reads as follows:

"This county (Caldwell) has Township Organization. One of the present Township Boards of the county, upon petition of taxpayers of that township, desires to have an audit of the road and bridge moneys of that township covering the two years preceding April, 1943, when the present Board took office.

"Kindly advise (a) whether a Township, in a county having Township Organization, through its Township Board, has authority to have the books, covering its road and bridge moneys collected and spent during the preceding two years, audited. If so (b) whom may such Board procure as auditors for such auditing? (c) What provision is there, if any, for the payment of such an audit?

"(d) If such township board has no authority to have its books audited, what provision is there, if any, for such an audit?"

You inquire if the present Township Board may have an audit made showing the collections and expenditures of road and bridge funds for the two years preceding April, 1943.

It appears to the writer that the Township Board should have this information on file for the reason that under the present law, Section 8817 R. S. Missouri, 1939, it requires the

road overseer to make, under oath, a detailed report to the Township Board at each regular meeting and a final report on or before the 20th of March, next after his appointment:

"It shall be the duty of every road overseer to make a detailed report and settlement, under oath, to the township board at each regular meeting thereof, and on or before the twentieth day of March next after his appointment he shall make final report, under oath, of all moneys received and expended by him, and from what source received and on what account expended, and final report of the disposition of all tools, machinery, books, papers and other property received by him as such overseer and belonging to such township or road district, and shall settle in full with said board for all moneys which he may have belonging to such road district or which may be owing by him to such district, and shall deliver to said board all tools, machinery, books, papers and other property belonging to such township or road district and received by him as such overseer."

Section 8830, R. S. Missouri, 1939, further provides that the Township Board shall keep a full, true and correct record of all money received and disbursed on account of roads and bridges, and between the first and tenth day of March of each year shall cause to be published an itemized statement of same, and a certified copy shall be left in the office of the County Clerk.

Therefore, in lieu of the above and foregoing statutory provisions, it does seem that such an audit should be unnecessary unless the above requirements of the law have not been fully enforced.

The Township Board is of statutory creation and has only such authority as granted by such statutes. It is an agent of the township with limited statutory authority. In *Jensen v. Wilson*, 145 S. W. (2d) 372, 1. c. 374, the Court said:

"* * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Con-

July 23, 1943.

sequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers.* * * * *

Notwithstanding the fact that such information should already be in the hands of the Township Board, we are of the opinion that the present Township Board, if they consider it an absolute necessity, may have an audit made without further delay. Section 13976, R. S. Missouri, 1939, reads as follows:

"In each township in this state, organized under the provisions of this chapter, there shall be a board of directors, composed of the township trustee and members of the township board, whose duty it shall be: First, to audit all accounts of township officers for services rendered as such officers except the township assessor, for services as such assessor; second, to audit all other accounts or demands legally presented to them against the township; third, to levy all taxes for township, road and bridge purposes, and all other duties provided by this chapter for the township board of directors to perform."

The above provision states what the duties of the Township Board shall be. One duty is that it shall audit all accounts with township officers for services rendered as such officers and furthermore that it shall audit all other accounts or demands legally presented to them against the township. As stated in State ex rel. Carpenter v. City of St. Louis, 2 S. W. (2d) 713, that the word "shall" in a statute, though imperative where the public has a right that ought to be exercised or endorsed, it may be directory or permissive.

We are of the opinion that a road overseer is a township officer. His duties are usually coextensive with the boundaries of the township, he takes an oath of office entering upon his official duties and he is under a bond to the township for the

July 23, 1943.

faithful performance of his duty. He also is appointed by the Township Board subject to removal by said Board.

CONCLUSION

Therefore, in view of the road overseer being a township officer and Section 13976, supra, specifically requiring the Township Board to audit all accounts of the township officers, it is the opinion of this department that in the absence of the Township Board having in their possession such an audit that the Board may have an audit made of the road and bridge moneys for the two years immediately preceding April, 1943. Furthermore, the Board may employ any person competent to make such an audit and pay for his services as provided by statute for other necessary expenditures.

Respectfully submitted,

AUBREY R. HAMNETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARR:jn

STATUTES:
LEGISLATURE:

A law applying to counties of certain population and under is not a special law.

April 6, 1943

H-21
Honorable Frank M. Frisby
Member of Senate
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of April 1, 1943, which reads as follows:

"I enclose herewith, copy of Senate Bill No. 96 which I introduced in association with Senators Donnelly and Smith of Greene.

"Since the introduction of this measure, a situation has arisen which in our opinion makes it advisable to eliminate Jackson County from the operation of this Bill and it is our thought now to amend the Bill so that it will apply to counties of 150,000 and under.

"The practical operation of this Bill would not affect St. Louis County because of a different system of titles therein, but a question arises as to whether or not this Bill would be legal if we made it apply to counties under 150,000; and we submit this question to you, requesting that you give us an opinion at your earliest convenience."

Your main inquiry is whether or not Senate Bill Number 96 can be amended so that it will apply only to counties of 150,000 population and under, and whether such an amend-

Honorable Frank M. Frisby (2)

April 6, 1943

ment would be a violation of Article IV, Section 53, of the Constitution of Missouri.

Article IV, Section 53, Constitution of Missouri, partially reads as follows:

"The General Assembly shall not pass any local or special law: * * * *
(2) Regulating the affairs of counties, cities, townships, wards or school districts: * * * * *."

The question involved is whether or not such an amendment which would apply to only counties under 150,000 population would be considered as special law. There are numerous cases which hold such a classification of counties as to population is not a special, but is a general law, providing the bill contains the following words: "Now or hereafter having a population of * * * * *."

In the case of State v. McCann, 47 S. W. (2d) 95, Pars. 1-2, 329 Mo. 748, the court said:

"Whether an act be local or special must be determined by the generality with which it affects the people as a whole rather than the extent of the territory over which it operates. If it affects equally all persons that come within its operation it cannot be local or special within the meaning of the Constitution. State ex rel. Garvey v. Buckner, 308 Mo. loc. cit. 401, 272 S. W. 940. That was said in relation to an act concerning the administration of justice in Jackson County abolishing the criminal court and vesting the jurisdiction of criminal cases in the circuit court.

April 6, 1943

"The general rule is that for legislative purposes, other things being equal, counties may be classified according to population. State ex rel. v. Clark, 275 Mo. loc. cit. 107, 204 S. W. 1090."

Also, in the case of Thomas et al. v. Buchanan County, 51 S. W. (2d) 95, Par. 9, 330 Mo. 627, the court said:

"The next point made by certain of the respondents is that the law is local and special in violation of subdivisions 2, 15, and 32 of section 53, article 4, of the Constitution, in that it singles out Buchanan county and attempts to regulate its affairs, creates a special board of estimate, and makes the county court a purchasing agent. It is true the only county in the state which, at this time, has a population between 95,000 and 150,000, is Buchanan county. But this does not make the law local, because the act applies as well to all counties which may hereafter have that population. In other words, the class is fixed, but the counties that fall within it may change as their population fluctuates. That such legislation is not local is established by numerous decisions of this court: Davis v. Jasper County, 318 Mo. 248, 253, 300 S. W. 493, 495; State ex rel. Moseley v. Lee, 319 Mo. 976, 993, 5 S. W. (2d) 83, 90."

Also, in the case of Roberts v. Benson, 142 S. W. (2d) 1058, Pars. 5-6, the court said:

April 6, 1943

"The rule is sound and is well settled that population may be properly used as the basis for classification in a general law regulating certain cities and counties when such classification is reasonable and germane to the purpose of the law. State ex rel. Gentry v. Curtis, 319 Mo. 316, 4 S. W. 2d 467. We found in the Hull case that population was a natural and reasonable basis for the classification used in the act under consideration for the reason that the Jones-Munger Law does not function in all respects in more populous centers.

"Although this act may apply at the time of its enactment only to one county or to one city because of such classification on population, such fact alone does not make the act a special rather than a general law. Hull v. Baumann, supra.

"The contentions advanced by appellants are identical with those in the Hull case and have been fully considered. They have been decided contrary to appellants' position. We have held the act to be a general law based on reasonable classifications and therefore not repugnant to constitutional provisions.
*****"

CONCLUSION

It is, therefore, the opinion of this department, that if Senate Bill Number 96 should be amended to apply only to counties having a population of 150,000 and under, it would not be a violation of Article IV, Section 53, of the Constitution of Missouri.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

AGRICULTURE
COMMUNITY SALES --
REGULATIONS.

Regulations authorized by Senate
Bill 11, relating to
Community Sales.

August 25, 1943

Dr. J. W. George
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

9-9



Dear Sir:

This is in reply to yours of the 23rd inst., wherein you request an opinion on the validity of the regulations accompanying said request, consisting of seven pages and relating to community sales as provided under Senate Bill 11 of the 62nd General Assembly.

Sec. 10 of said Bill is as follows:

"The State Veterinarian shall promulgate and enforce rules and regulations for the purpose of maintaining a good state of sanitation on the premises, including livestock yards, pens or vehicles used by or for the licensee in which animals are quartered, fed or transported. The State Veterinarian shall require all licensees defined in this act to obtain such inspection of all livestock offered for sale at any community sale in such manner as he may designate. The State Veterinarian, or his deputy, may in his discretion order any stock vaccinated or quarantined or both when he thinks such action advisable; provided that the authority to require vaccination given herein shall not be construed to give the State Veterinarian power to issue a general order for the vaccination of all livestock sold in this state or sold at all community sales in this state. Such inspections shall be made by a licensed veterinarian or deputy approved by the

Aug. 25. 1943

State Veterinarian, and in accordance with rules and regulations that may be made by the State Veterinarian not contrary to the provisions of this act. Said veterinary inspector shall be subject to dismissal by the State Veterinarian for neglect of duty in the enforcement of the provisions of this act or for misconduct while on official duty."

The lawmakers by this section have delegated to the State Veterinarian power to make certain rules and regulations. Such delegation of power has been held constitutional by our courts in a number of cases, especially in cases in which the Public Service Commission has exercised similar powers. In State ex rel. v. Public Service Commission, 270 Mo. 547, the Public Service Commission exercised its delegated powers in fixing rates and the court held that such act was authorized under the statute and not violative of the constitution.

Comparing the proposed regulations with the provisions of said Sec. 10 of Senate Bill 11, we think these regulations are within the scope of the powers granted in said section.

C O N C L U S I O N .

From the foregoing it is the opinion of this department that the proposed rules and regulations, consisting of seven pages, which accompanied your

Dr. J. W. George

-3-

Aug. 25, 1943

request, are valid and within the scope of authority granted under Section 10 of Senate Bill 11, of the 62nd General Assembly.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:LeC

August 30, 1943.

9-9



Honorable John M. Gallatin
President
Missouri Probate Judges' Association
Chillicothe, Missouri

Dear Judge Gallatin:

We are in receipt of your letter of August 25, 1943, requesting an opinion of this Department, which letter is as follows:

"As President of the Missouri Probate Judge's Association I have had several inquiries concerning the House Committee Substitute for Senate Bill No. 4, which was passed by the Sixty-second General Assembly. This Act places the Probate Judges in counties having a population of less than 19,000 on a salary basis.

"It was agreed by the officers of our Association meeting at Sedalia yesterday that an early ruling from your Department in regard to some of these questions would be of great service to the Probate Judges of the State. I therefore, respectfully ask for an opinion of your Department on the following:

- "1. On what date does the act take effect?
- "2. Does it apply to the Probate Judges now in office?
- "3. Does the 1940 decennial census regulate the population of the county?

August 30, 1943.

"4. If the yearly fees exceed the amount to which each Judge is entitled by reason of the population of his County is it mandatory on the County Court to pay such excess fees over to the Probate Judges?

"5. Must the accrued fees due each Judge at the time this Act takes effect be reported to the County Court and when such accrued fees are collected must they be paid into the County Treasury the same as current monthly fees?

"I understand the Governor signed this bill August 4th and as our Annual Association meets in October we will greatly appreciate an early opinion on this matter."

We enclose herewith copy of an opinion rendered by this office, dated August 25, 1943, written by Honorable Lawrence L. Bradley, Assistant Attorney-General, which opinion, we believe answers some of the questions contained in your letter. The first question is answered by a statement on page five of said opinion, holding that the effective date is fixed by Section 659, Revised Statutes of Missouri, 1939. The fourth question contained in your letter is answered on page three of said opinion. We assume by this question that you refer to fees in excess of the salary provided by House Committee Substitute for Senate Bill No. 4 (hereinafter referred to as Senate Bill No. 4).

Said Senate Bill No. 4 applies to probate judges now in office. The bill commences with the statement, "the judges of the probate courts in the counties which now have * * *," and the entire text of the act indicates that it is not intended to apply to a future date but is intended to apply as soon as the act becomes law. Said opinion herein referred to points out that Section 8, Article XIV, of the Constitution, is not applicable because the provisions of this act do not amount to an increase in salary during a term of office.

Said Senate Bill No. 4 refers to population of the counties without indicating how this population should be determined.

In the absence of any statutory provision on this question, the last decennial census would be controlling. This question was determined in the case of *State ex rel. O'Connor v. Riedel et al.*, by the Supreme Court, en banc, 46 S. W. (2d) 131, 1. c. 135. The court held:

"* * *There is no express language requiring a resort to the 'next' or any other decennial census of the United States. But the implication is clear that after the occurrence of the event which puts an end to the further use of the presidential vote method the populations shall be ascertained from the official census of the United States. But which census? One which is obsolete for all except historical or statistical purposes? Manifestly the one at the time in current use for every other practical purpose--the last one. That which is implied in a statute is as much a part of it as what is expressed. 2 Sutherland on Stat. Const. (2d Ed.) Sec. 500, and cases cited. * * *"

The fifth question contained in your letter is answered by the following quotation from said Senate Bill No. 4, beginning with the second sentence in said act, which is as follows:

"It is further provided that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided,
* * *"

August 30, 1943

It will be noted that the act requires that a probate judge shall "report all fees actually collected by him or his clerk during the month." And further on the act provides that there shall also be made "a report of all such fees earned during the month but not yet collected." And then again the act provides that "he shall at the end of each month pay over to the county treasurer all monies collected."

Conclusion.

It is, therefore, the opinion of this Department that:

- (1) Senate Bill No. 4 will take effect as law ninety days after the adjournment of the Sixty-second General Assembly. The General Assembly adjourned on August 23d. Ninety days thereafter would be November 21st. However, that day falling on Sunday, the act will become effective on the following Monday, or November 22d;
- (2) Said act applies to probate judges now in office;
- (3) The 1940 Decennial Census is the census upon which the population of the county is to be determined;
- (4) If the fees collected by a probate judge during any one year exceed the salary provided by said act for a county that comes within the population class specified in the act, at the end of the year when the yearly report is filed the county court must pay such excess fees over to the probate judge, subject to the limitations set out in Section 13404, Revised Statutes of Missouri, 1939;
- (5) After the effective date of Senate Bill No. 4, the probate judge, subject to said act, must pay over to the county each month all of the accountable fees collected by him during such month, whether or not such fees were earned prior to the effective date of said Senate Bill No. 4.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LAP:EG

STATE HIGHWAY PATROL: Violation of a city ordinance
is not a criminal offense.

March 31, 1943

Col. M. Stanley Ginn
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

4/1
FILED
33

Dear Sir:

We are in receipt of your request for an opinion,
under date of March 30, 1943, which reads as follows:

"We respectfully request your opinion
on the following:

"An applicant for membership in the
Patrol has been convicted and paid a
fine for speeding in violation of a
city ordinance of the city of St. Louis,
Missouri.

"Section 8352, Revised Statutes of Mis-
souri, 1939, provide 'no person shall
be appointed a member of the
Patrol who shall have been convicted
of or against whom any indictment may
be pending for any offense.'

"Is the man who has been thus convic-
ted ineligible for membership on the
Patrol?"

Section 8352 R. S. Missouri, 1939, partially reads
as follows:

"No person shall be appointed as super-
intendent, captain or member of the pa-
trol who shall have been convicted of

or against whom any indictment may
be pending for any offense; * * * ."

In reading the above partial section, it will be noticed that it contains the words, "against whom any indictment * * * ."

In your request you state that the applicant for a membership in the State Highway Patrol has been convicted for speeding, in violation of the city ordinance of the city of St. Louis, Missouri. Since the partial section uses the word "indictment", it shows that it was the intention of the legislature to mean a crime filed on by an indictment, under the State law. Cities are not authorized to bring in indictments for violation of city ordinances.

It is true the section says that a person cannot be appointed to the State Highway Patrol if convicted of, or against whom any indictment may be pending for, any offense. In construing a statute the meaning of the language of the statute is narrowed, or broadened, to conform to the legislative intent, as gathered from its entirety, history and purpose. (Rust v. Missouri Dental Board, 155 S. W. (2d) 80.) If it was the intent of the legislature that a person would be ineligible to be a member of the State Highway Patrol if he had violated a city ordinance, it would have included terms regarding the violation of the city ordinance.

The effect must be given if possible to every word, clause, sentence, paragraph and section of a statute, in arriving at a construction of the legislative intent. (Graves v. Little Tarkio Drainage District No. 1, 134 S. W. (2d) 70, 345 Mo. 557.)

The statute also uses the word "offense" and can only be construed as meaning a criminal offense, for the reason that the word "convicted", and the word "indictment" are a part of the section. It is common knowledge that the violation of a city ordinance is not a criminal offense. It was so held in the case of Kansas City v. Neal, 122 Mo. 232, 1. c. 234, where the court said:

"In *Ex Parte Hollwedell*, 74 Mo. 395, it is held that the violation of a city ordinance is not a criminal offence within the meaning of the constitution, and that a proceeding by a city to recover a fine for the violation of such ordinance need not be by indictment or information in the name of the state.

"The proceeding by the city against the defendant Neal for a violation of its ordinances was but a civil suit in form and quasi criminal in its character for the collection of a fine for the violation of its laws enacted for the better promotion of peace and good order within its limits. *City of Kansas v. Clark*, 68 Mo. 588; *City of St. Louis v. Vert*, 84 Mo. 204."

Also, in the case of *State ex rel. v. Renick*, 157 Mo. 292, 1. c. 300, the court said:

"The term 'offenses' as there used, means violations of State laws; the context forbids any other interpretation. That there is a well-recognized distinction between the nature of offenses which consist in violation of city ordinances and of those which consist in the violation of a State law is pointed out in *Dillon on Municipal Corporations* (4 Ed.), sec. 429, and the nature of the proceeding to recover the fine or penalty for violating an ordinance, and the character of court in which the proceeding may be had is shown. The nature of the proceeding and character of the judgment, is also shown in *Stevens v. Kansas City*, above referred to. The section of the Constitution conferring this

Col. M. Stanley Ginn

(4)

March 31, 1943

power, requires the Governor to communicate to the General Assembly every act of his under that section 'stating the name of the convict, the crime for which he was convicted,' etc. That language clearly indicates that the framers of the Constitution had in mind only offenses against the State law."

CONCLUSION

It is, therefore, the opinion of this department, that an applicant for membership on the State Highway Patrol, who has been convicted and paid a fine for speeding, in violation of the city ordinance of the city of St. Louis, Missouri, can be appointed as a member of the Highway Patrol.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

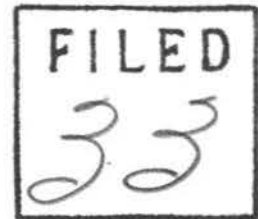
WJB:RW

INHERITANCE TAX:
Deductions:

Homestead and dower.

June 14, 1943

6-17



Mr. C. L. Gillilan, Supervisor
Inheritance Tax Division
State Treasurer's Office
Jefferson City, Missouri

Dear Mr. Gillilan:

We are in receipt of your letter of June 9, 1943,
requesting an opinion, which letter is as follows:

"I am in receipt of a request from a
Probate Judge for a ruling. The facts
as presented are as follows:

"Decedent died intestate; assets consist
of a farm upon which he lived and per-
sonal property; he leaves a wife (no
children) and two brothers; the wife
takes statutory allowance and one-half
of assets--the two brothers one-half;
the brothers claim a widow's dower in-
terest should be deducted from their
one-half interest in the real estate
for the purpose of determining the
amount of Inheritance Tax due on their
interest.

"Please advise me as to the correctness
of this claim."

In the absence of an election by the widow to take
one-half of the real and personal estate subject to debts,
the widow would take only one-third under the general dower
statute, Section 318, R. S. Missouri, 1939, which is as fol-
lows:

"Every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law, to hold and enjoy during her natural life. Dower in leasehold estate for a term of twenty years or more shall be granted and assigned as in real estate; for a less term than twenty years, shall be granted and assigned as in personal property."

Section 327, R. S. Missouri, 1939, provides for an election, and subsequent sections provide how the election shall be made.

In the case of Wallace v. Crank, 324 Mo. 1114, 26 S. W. (2d) 601, the Supreme Court held that the widow's right in the husband's estate in the place of dower is statutory, and her election must be made in substantial compliance with the statute.

In the case of Lee's Summit Building & Loan Ass'n. v. Cross, 345 Mo. 501, 134 S. W. (2d) 19, the Supreme Court held that where there is no election by the surviving spouse within the time specified by Section 329, the surviving spouse is endowed with a one-third interest for life free from debts.

Your letter states that the brothers claim a widow's dower interest should be deducted from their one-half interest. If the widow has elected to take one-half of the estate, she takes same in lieu of dower, and there is no dower whatever. If she has not elected, she will take one-third, which will be her dower.

We presume that no question of quarantine is involved because it appears from the facts that the question of dower is settled by the election to take one-half of the estate.

The only remaining problem with reference to the assessment of inheritance tax seems to be the question as to

whether or not homestead rights of the widow should be deducted from the one-half interest of the two brothers.

In the case of *Adams v. Adams*, 183 Mo. 396, 82 S. W. 66, the Supreme Court held that when the widow elects to take under Section 325, R. S. Missouri, 1939, she is entitled, first, to one-half of the real estate and homestead in the balance.

In the case of *Coleman v. Coleman*, 122 Mo. App. 715, 99 S. W. 459, the Court of Appeals held that a widow, where her husband dies leaving no lineal heirs, is entitled to one-half of the real estate absolutely, and homestead to the value of \$1,500 in the remainder.

The presumption is in favor of homestead until the contrary appears, and the burden of proving that a homestead has ceased to exist is on him who asserts it. *Seilert v. McAnally*, 223 Mo. 505, 122 S. W. 1064, 135 Am. St. Rep. 522. However, when the Probate Court fails to find homestead, the prima facie presumption is that there is none, and the burden of showing it is then on the parties claiming homestead. *Murphy v. De France*, 105 Mo. 53, 16 S. W. 861.

Therefore, in this case, if there is a homestead right, the widow would be entitled to \$1,500 out of the shares of the brothers in addition to the one-half which she has elected to take. However, if the Probate Court, in assessing an inheritance tax, determines that no homestead right exists, the presumption would be that his decision is correct.

If the widow has not complied with the statute in making her election to take one-half, the tax should be assessed on the theory that she takes only one-third. If the heirs are not satisfied with this assessment, they can resort to the remedy provided for in Section 351, R. S. Missouri, 1939, which is as follows:

"When any widow shall be entitled to dower in lands, or other real estate, whereof her husband died seized, or in which he had an interest at the time of

his death, it shall be lawful for any heir or legatee, or the guardians of such as are minors, entitled to any interest in such lands or real estate, or the executors or administrators of the intestate, or any creditor of the widow, and, after her marriage, any creditor of her husband, or any other person having any interest in such lands or such real estate, to apply by petition to the circuit court of the county wherein the principal messuage lies, or, if there be no such messuage, then in any county in which any of the lands lie, to assign and admeasure such dower, giving twenty days' notice in writing of such intended application to such widow, by personal service, or by leaving a copy at her usual place of abode."

If no election is made as required by law, and the widow takes dower under Section 518, supra, the value of her interest should be determined in accordance with Section 595, R. S. Missouri, 1939, which is as follows:

"The value of every future or contingent or limited estate, income, or interest, shall, for the purposes of this article, be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities, and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum. The commissioner of insurance in this state shall, on the application of the court, determine the value of any future or

contingent estate, interest or income and certify the same, and such certificate shall be prima facie evidence of the value of such estate, interest or income."

CONCLUSION

It is our opinion that the widow is entitled to her homestead in addition to dower if a homestead right exists, and no election or overt act on her part is necessary to protect such right. However, homestead rights do not exist in all cases, and where they have existed they are sometimes abandoned or alienated. It is within the judgment of the Probate Court, in assessing an inheritance tax, to determine whether or not there is a homestead right in favor of the widow. If she has a legal right to homestead, it should be deducted, along with dower or one-half of the assets taken in lieu of dower, from the balance of the estate which will be received by the other heirs, in determining the inheritance tax to be paid by such heirs.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:HR

COUNTY COLLECTORS: Monthly reports required; liability for failure to make.

July 13, 1943

Hon. J. R. Gideon
Prosecuting Attorney
Forsyth, Missouri



Dear Sir:

We are in receipt of your letter of July 5, 1943, requesting an opinion, which letter is as follows:

"The Collector of the Revenue of Taney County, failed to file his verified statement for collections made during the month of February, 1943, until the 25th day of June last and failed to pay the taxes collected during said month into the County Treasury until the said 25th day of June. That on said last mentioned date he paid the taxes collected for said February, into the County Treasury taking a receipt from the County Treasurer therefor and also filed his verified statement with the County Clerk.

"Since the Collector failed to comply with Section 11098 R. S. Mo. 1939, by failing to file his verified statement of collections made and by failing to pay over to the County Treasurer said collections on or before March 15th, 1943, would said Collector be subject to the forfeiture and penalty provided for in Sections 11099 and 11104 R. S. Mo. 1939, since the money has been paid and receipt taken?

"The county court of this county wants to know if they would be justified in ordering a suit filed to recover such forfeiture and penalty as provided in the two sections of the statute last above mentioned."

Section 11098, R. S. Mo. 1939, requiring the making of monthly statements and payments, is as follows:

"Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

The Supreme Court in the case of State ex rel. Stephens v. Wurdeman, 295 Mo. 566, in referring to the word "shall," said:

"Usually, the word 'shall' indicates a mandate, and unless there are other things in the statute it indicates a mandatory statute."

In the case of State ex rel. Douglas County v. Alsup, 91 Mo. 172, 4 S. W. 31, the court held that a collector of county taxes, who is not a defaulter, is entitled to commissions upon his collections and thereby inferentially held that he would not be entitled to these commissions if he were a defaulter.

Section 11099, R. S. Mo. 1939, provides penalty for failure to make monthly statements and payments, and is as follows:

"If any county collector, or ex officio county collector, shall fail or refuse to pay the taxes and licenses into the state and county treasuries, as provided in the preceding section, he shall forfeit his commissions thereon, and in addition thereto shall pay a penalty of ten per cent on the amount thereof, and it shall be the duty of the state auditor to issue a distress warrant for such state taxes and penalties within thirty days, as provided by law. It shall be the duty of the prosecuting attorney to proceed, within thirty days, to collect such county, school, road and municipal taxes by suit on the official bond of such defaulting collector."

In the case of State of Missouri, ex rel. Brewer v. Federal Lead Company (D. C.) 265 Fed. 305, the court held that where the collector fails to make statement with the county court on the last day of his term, or fails to make payments on the settlement to the county treasurer, both he and his bondsman become liable. This section (Section 11099, supra) is a penal statute and, therefore, must be strictly construed.

In the case of Judson v. Smith, 104 Mo. 61, 1. c. 73, the court said:

"There is no canon of construction more rigidly and universally followed than that which requires statutes prescribing summary remedies, remedies in derogation of common law and common rights, to be strictly or literally construed. Touching this point an eminent law-writer says: 'A summary distress warrant against the collector and his sureties can only be awarded where the bond is in accordance with the statute, and where all the statutory conditions exist. The process being extraordinary and in derogation of the common law, the steps leading to it must all

have been taken; and, if it is issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser. The liability is strictissimi juris, and cannot be extended a single step beyond the statutory permission. The same remark may be made of the case of application for judgment on motion. The statute must be strictly pursued, as the ordinary legal intendments do not apply in aid of the proceedings in such a case. But, where the statute has been strictly pursued, the summary remedies have been sustained by the courts without hesitation.' Cooley on Taxation (2 Ed.) 719, and cases cited. To the same effect, see 2 Desty on Taxation, 762, 763, 1034, 1043.

"It only requires a very cursory examination of the warrant issued herein, and the statutory provisions already set forth, to see, at once, that those provisions have not been complied with, either strictly or substantially.

"The governing idea of the statute under discussion is the enforcement of prompt payments of the public revenues. Instead, however, of this being done, there was no exaction of monthly payments as required by the statute, nor was the warrant in question issued by the auditor until some eighteen months after Reddick, the collector, went out of office. More than that, the warrant itself does not comply with, nor conform to, the form given by section 7569; because that section is framed for the collection of the revenue but for a single year, and not for former years, as is the case with the present warrant."

The above case, however, referred to distress proceedings by the State Auditor, which are in the nature of ex parte pro-

ceedings and, therefore, would be more strictly construed than a suit on bond as authorized under Section 11105, R. S. Mo. 1939, which will be hereafter referred to.

Section 11104, R. S. Mo. 1939, provides for a penalty for failure to make payment of taxes in the time and manner prescribed by law. It seems as if the collector can be proceeded against under either one of these penalty sections.

Section 11102, R. S. Mo. 1939, provides further penalty against the collector for failing to deposit the revenue as required by law, which section is as follows:

"For every failure of the collector to deposit the revenue, as required by this chapter, he shall forfeit to the state the sum of five hundred dollars, to be recovered of him or his sureties by suit on his official bond, and the auditor shall direct the prosecution of such suit immediately on the occurrence of such failure."

Section 11105, R. S. Mo. 1939, provides the manner of procedure against a defaulting collector, which section is as follows:

"If any collector shall fail to pay into the county or state treasury the amount of taxes or revenue by him collected, due the state or county, respectively, at the times and in the manner by this chapter required, he and his sureties shall be liable to pay ten per cent per month upon the amount which he shall so fail to pay, as a penalty; and in case of such refusal, notice may be served upon such collector in default and his sureties, informing them that at the next term of the circuit court of the county a motion will be made to said court for a judgment against such collector and his sureties, for all sums of money due from him to the state or county, as the case may be, at time of

making such motion, together with the penalty aforesaid. The circuit courts of this state are hereby vested with power and jurisdiction to hear and determine all such motions and proceedings at the first term at which such motions may be made. The judgments rendered by the court under the provisions of this section shall have the same force and effect, and be enforced in the same manner, that other judgments in the circuit courts of this state are enforced. Proceedings under this section shall be in the name of the state or county, as the case may be. Such notice may be served by any constable, coroner, or other person who would be a competent witness, and shall be served at least five days before the motion is made. The court shall have power to compel the production of all books, papers, records and other documents in the possession of the collector or others, to be used as evidence in the cause."

It will be particularly noticed that this section provides the procedure when the taxes collected are not paid over "at the times and in the manner by this chapter required."

In the case of Wimpey v. Evans, 84 Mo. 144, the court held that proceedings under this section for failure to pay moneys collected as required by law is not ex parte and may be resorted to after the expiration of the collector's term as well as during his term.

We note that Section 11099, supra, provides that "it shall be the duty of the prosecuting attorney to proceed, within thirty days, to collect." However, it does not appear that this provision is a limitation on the right of the county to sue on the collector's bond.

CONCLUSION

It is our opinion, therefore, that under the plain language of Section 11098, supra, the collector has defaulted

July 13, 1943

and, therefore, forfeited his right to his commissions on the money on which he defaulted as provided in Section 11099, R. S. Mo. 1939, and has become liable for the additional penalty therein provided.

It seems also that the penalty provided in Section 11102, R. S. Mo. 1939, is cumulative and may also be recovered if the action is brought in the name of the State instead of the county.

In addition to the common law right to sue the collector on his bond the statutes provide two other statutory proceedings. One is by distress warrant, provided for in Section 11099, supra, and the other is the procedure provided in Section 11105, supra.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney-General

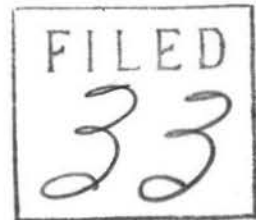
APPROVED:

ROY McKITTRICK
Attorney-General

LAP:CP

OFFICERS) The County Court and not the Township Board
) is authorized to fill vacancy in office of
TOWNSHIP TRUSTEES) Township Trustee.

November 9, 1943



Honorable William E. Gladstone
County Clerk
Gentry County
Albany, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 5, 1943, presenting for our opinion the following:

The office of Trustee of Cooper Township was made vacant by the death of Mr. J. L. Grantham, the Trustee. The Township Board appointed a person to fill that vacancy and on the same day, namely; November 4, 1943, the County Court likewise made an appointment to fill such vacancy. The person appointed by the Township Board is now serving as Trustee, and you ask who is entitled to such office, the person appointed by the Township Board or the person appointed by the County Court.

Section 13962, R. S. Mo. 1939, provides:

"Whenever any township shall fail to elect the proper number of officers to which such township may be entitled, or when any person elected or appointed shall fail to qualify, or when any vacancy shall happen in any township office from any cause, it shall be lawful for the township board to fill such vacancy by appointment, and the person so appointed shall hold the office and discharge all the duties of the same during such unexpired term, and until his successor is elected or appointed and qualified, and shall be subject to the same penalties as if they had been duly elected: Provided, that

any vacancy in the office of justice of the peace or in the township board shall be filled by appointment of the county court."

(Underscorings added.)

This section was formerly section 13198, R. S. Mo. 1919.

The exact question was passed upon by the Supreme Court of our State in the case of State ex rel. Kent vs. Olenhouse, 23 S. W.. (2d) 83. The facts there were about as follows:

One E. M. Conway was elected Trustee of Chillicothe Township, Livingston County, in the Township election. He duly qualified as such and entered upon the discharge of his official duties and then died. The County Court of Livingston County appointed one Winans as Township Trustee to fill the vacancy. Winans tendered his bond to the Township Board. The two surviving members could not agree; one contended that Winans was duly appointed and entitled to the office and the other member contended that the Board and not the County Court had the right to appoint the Trustee. A taxpayer of the Township then filed a mandamus action to compel the two members of the Township Board to fill the vacancy in the office of Trustee by appointing a successor to Conway, and to organize the Township Board by the election of a president.

In denying the relief sought the Supreme Court held: (23 S. W. (2d) 1.c. 86:

"By express terms of the statute, the township trustee is made a member of the board of directors; therefore, a vacancy in the office of township trustee creates a vacancy in the board of directors. Section 13198 of the statute heretofore quoted vests authority in the county court to fill vacancies in the township board. As the township board is, in fact, the board of directors, it logically follows that the county court and not the township board is authorized to fill the vacancy

in the board of directors caused by the death of M. E. Conway."

It was ruled: (l.c. 86-87.)

"We will suggest in passing that it appears from the pleadings that the county court appointed and commissioned one Joseph F. Winans to fill the vacancy in the office of trustee and member of the board of directors, and that he duly qualified as such by taking the oath of office and tendering a sufficient bond as required by statute. If these facts are true, Winans bond should be approved, he should be recognized and accepted as trustee and a member of the board of directors, and the board should elect a president and proceed to transact the business of the township; but we are powerless to compel such action in this proceeding for reasons already stated, and for the further reason that the pleadings do not ask for such relief.* * *"

CONCLUSION

Therefore, it is the opinion of this office that when a vacancy occurs in the office of Township Trustee, and Ex Officio Treasurer, the County Court and not the Township Board, has the authority to fill such vacancy by appointment.

Respectfully submitted,

Vane C. Thurlo
Assistant Attorney-General

VCT:ir

(SUPPLEMENTAL OPINION)

ELECTIONS:) No fees provided for services for proclamation or
SHERIFFS:) notice of election for Constitutional Convention
delegates.

February 27, 1943.



Hon. Arthur U. Goodman, Jr.,
Prosecuting Attorney
Kennett, Missouri

Dear Mr. Goodman:

The Attorney-General wishes to acknowledge receipt of your letter of February 19th relative to the fees of the Sheriff for his services rendered and the conduct of the election for the selection of delegates to the Constitutional Convention.

Sections 13411 and 13413, R. S. Mo. 1939, set out the fees to be allowed sheriffs of this State for their services. It will be seen from reading these two statutes that there is no provision made for the payment of fees to the sheriffs of the different counties for the issuance of a proclamation or notice of election which the sheriff is to make pursuant to a writ of election issued by the Governor to said sheriff. Furthermore, we have examined the revised statutes for any other sections which might provide for a fee to be allowed the sheriff for such service and nowhere are we able to locate any such provisions.

In the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, we find the following statement:

"It is well established that a public officer claiming compensation for official duties performed must point out the statutes authorizing such payment."

In other words, it is necessary for an officer to show a statute authorizing payment of fees to him for his official duties in order that such fees be collected. This case has been cited

Feb. 27, 1943.

approvingly on several occasions and seems to be the rule in Missouri at this time.

There can be no doubt that it is the duty of the sheriff to make the proclamation required under Section 3 of Article XV of the Constitution of Missouri, even though no compensation is allowed under the statutes. In view of the holding in *Nodaway County v. Kidder*, supra, it is the opinion of this Department that the sheriff is entitled to no fees for his services which he renders in the issuing of a proclamation or notice of election pursuant to a writ of election issued to him by the Governor ordering an election for delegates to the Constitutional Convention.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

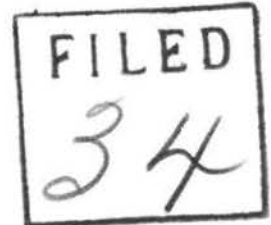
ROY MCKITTRICK
Attorney-General

JSP:EG

CRIMINAL COSTS: Where property is taken from a dwelling house, valued at less than \$30.00, county pays the costs; and, if more than \$30.00, the State pays the costs.

June 10, 1943

Mr. Arthur U. Goodman, Jr.
Prosecuting Attorney
Kennett, Missouri



Dear Sir:

This is in reply to your letter of June 8th, 1943, in which you request an opinion from this department, as follows:

"Please advise me whether or not in your opinion a county is liable for the costs in a case wherein a defendant who is 16 years of age pleads guilty to larceny from a dwelling house and his punishment is by the Court fixed at confinement in the Missouri Training School for Boys for a term of three years."

Section 4459, R. S. Mo. 1939, reads as follows:

"If any larceny be committed in a dwelling house, or in any boat or vessel, or in any railroad car, or street car or interurban car, or by stealing from the person, if the value of the property taken is thirty dollars or upwards, the offender shall be punished by imprisonment in the penitentiary not exceeding seven years."

Section 4460, R. S. Mo. 1939, reads as follows:

"When the property taken under the circumstances stated in the next preceding section is less than thirty dollars in value, the offender may be punished by imprisonment in the penitentiary not exceeding seven years, or by imprisonment in the county jail not exceeding one year."

The above two sections are applicable to cases in which the charge is larceny in a dwelling house. In most criminal prosecutions under these two sections there is a combination of burglary and larceny and, upon an acquittal of the burglary charge, it would be necessary for the trial court to instruct on the larceny charge as to all degrees. If the property taken in the dwelling house is \$30.00 or upwards, the sole punishment would be imprisonment in the penitentiary, but if the property taken in the dwelling house is less than \$30.00 the punishment may be as low as one year in the county jail, as set out under Section 4460, supra. State v. Nicholas, 222 Mo. 425.

In your request you merely state that the defendant, who is 16 years of age, plead guilty to larceny from a dwelling house and was sentenced to the Missouri Training School for boys for a term of three years. Even if the property taken was valued under \$30.00 he could have received a sentence of three years in the penitentiary. The information to which he plead guilty, of course, sets out the value of the property taken and would be the governing authority as to who should pay the costs in the case, where the confinement is fixed in the Missouri Training School for Boys.

The section applicable to your question is Section 4221, R. S. Mo. 1939, which partially reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall

be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, work-house or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * * *

Under the above section it will be specifically noticed that the state only pays the costs when the defendant is unable to pay them, and when the conviction was had of the 16 year old boy on an offense punishable solely by imprisonment in the penitentiary. If the conviction was had under Section 4459, supra, then, under Section 4221, supra, the state should pay the costs. But, if the conviction was had under Section 4460, supra, which applies to property taken where the value was less than \$30.00, the county should pay the costs.

CONCLUSION

It is, therefore, the opinion of this department that where a defendant, who is 16 years of age, pleads guilty to larceny from a dwelling house and his punishment is, by the court, fixed at confinement in the Missouri Training School for Boys for a term of three years, the county should pay the costs if the value of the property is \$30.00 or less, and the state should pay the costs if the value of the property is \$30.00 and upwards. If the defendant was charged and plead guilty to a delinquency charge in which the evidence was larceny from a dwelling, the county and not the state would be liable for the costs. In order that the state be liable for the costs it would be necessary that the defendant,

who is 16 years of age, should be filed upon in the criminal court on a criminal charge on an offense which is punishable solely in the penitentiary, or punishable as a capital offense.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WJB:CP

TAXATION: Property held by trustee by Jones-Munger delinquent
EXEMPTION: tax sale is exempt from taxation.

April 20, 1943



Hon. Charles S. Greenwood
Prosecuting Attorney
Chillicothe, Missouri

Dear Mr. Greenwood:

This is in reply to your letter of recent date wherein you submit the following statement and request:

"I would like to know whether a piece of property that has been bid in at a third sale under the Jones-Munger Law (Section 11, 130) Revised Statutes, 1939, by the trustee appointed by the County Court by Section 11, 131, Revised Statutes, 1939, is subject to any prior taxes or taxes due on the property assessed by the City of Chillicothe. In other words, the county trustee bid the property in and now Livingston County holds title to it. Does this property become exempt from taxes of the city?"

Section 11130, Revised Statutes of Missouri, 1939, provides in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period

of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchased at such sales shall be entitled to immediate issuance and delivery of a collector's deed. * * * * *

By this section, when lands are sold at a third sale, no period of redemption is provided for, and the collector is required to issue a deed at once. The purchaser at such sale, whether he be a private individual or the trustee named in Section 11131, Revised Statutes of Missouri, 1939, takes the fee title to the land sold, provided he complies with the other provisions of the statute. Section 11131 provides in part as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 11130 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. * * * * *

On lands or lots so purchased, and on the lands or lots so disposed of, the State, County, School Districts and Road Districts are generally the political sub-divisions to which the taxes belong.

Section 6 of Article X of the Constitution of Missouri, provides in part as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. * * * * *

The tax funds for which lands are sold generally belong to one of the public bodies named in said Section 6, supra. So, if such lands are purchased and held by a trustee for the use and benefit of these funds which belong to political sub-division of the state, then they would be exempt from taxation under the Constitution.

In the case of State ex rel. v. Bauman, 153 S. W. (2d) 31, l. c. 34, the court, in discussing a question similar to the one here presented, said:

"Even though taxes have been levied and assessed against a tract of land while under private ownership, if it be afterwards acquired by a governmental agency such taxes may not be collected. Bannon v. Burnes, C.C.W.D. Mo., 39 F. 892. And see cases cited in the notes in 30 A.L.R. 413 and 2 A.L.R. 1535. Since the City is seeking to purchase the land in its public governmental capacity and not as a mere fiduciary, the land becomes immune from taxation as soon as the City becomes the owner of it and such immunity would extend to taxes previously assessed and levied."

In the Bauman case, the court held that after the City of St. Louis had acquired the tax certificate to certain lots it purchased under a delinquent tax sale in that city, said lots were exempt from taxation thereafter and that the city was not required to pay taxes which accrued from the date of the sale until the time for redemption had expired. The lands

April 20, 1943

sold in the Bauman case to the City of St. Louis were sold before the law was amended, providing for a trustee to make the purchase, as is provided for under Section 11131, supra. When the City of St. Louis, in the Bauman case, obtained the certificate of title, the court held that the city had an equitable title to lots. At l. c. 35, the court made this statement:

"The right to call in the legal title ordinarily presupposes an equitable title in the person who may exercise the right. An equitable title has been described as the right in the party to whom it belongs to have the legal title transferred to him upon the performance of specified conditions. *Karalis v. Agnew*, 111 Minn. 522, 127 N. W. 440. The act permits the application of this rule in this case. Therefore, the City is now vested with the equitable title to the land and the land is not subject to taxes. In *King County, Washington v. United States Ship Board, E. F. Corp.* 9 Cir., 282 F. 950, 953 it is stated: 'The taxable character of property is to be referred to the status of the real, rather than the nominal, owner. Private property is not exempt from taxation because the government holds the legal title thereto, and by parity of reasoning neither is public property taxable because the naked legal title is in a private person. * * * * *'"

CONCLUSION

Following the principle in the Bauman case, the title to lands purchased by trustees under Section 11131, supra, would be within the exempt class provided for under Section 6, Article X of the Constitution, because both the legal and equitable title is vested in the trustees who hold the lands for the use and benefit of tax exempt bodies.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

ROY MCKITTRICK
Attorney General

TWB:NS

TAXATION: Penalty and interest on delinquent
SOLDIERS AND SAILORS: taxes of persons in military service
DELINQUENT TAXES: forgiven.

June 16, 1943



Mr. R. E. Gruner
Mr. R. E. Gruner, Collector
City of St. Louis
110 City Hall
St. Louis, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department. Your letter is as follows:

"I have been informally advised that under provisions of Article V of the Soldiers and Sailors Civil Relief Act, soldiers, sailors and others coming within the provisions of this Act cannot be required to pay any penalties on delinquent taxes, but that same would be discharged upon payment of the face amount of the tax bill, with six per cent interest per annum, figured to the date of payment.

"Will you be good enough to let us have your opinion as to whether or not under the provisions of this Act, we are, (1) permitted to add to the bill the usual two per cent for collection commission in addition to the above six per cent, (2) if we are not permitted to add the two per cent, are we then permitted to retain two per cent commission out of six per cent interest.

"The above will be a matter of interest to all Collectors in the State of Missouri, as our offices are maintained solely on commissions."

Since you refer to Article V of the Soldiers' and Sailors' Civil Relief Act as found at page 98, Title 50, App., we set forth Subdivisions 1, 2, 3 and 4 of Section 151 thereof, relating to taxes and public lands, as follows:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in mil-

itary service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

You desire to know whether you are (1) permitted to add to the bill the usual two per cent for collection commission in addition to the six per cent interest per annum, (2) if not permitted to add the two per cent are you then permitted to retain two per cent collection commission out of the six per cent interest above referred to.

Under the provisions of Sections 11182 and 11196, R. S. Mo. 1939, the collector is entitled as his fee for collecting delinquent taxes two per cent on all sums collected, and this is the two per cent commission which you refer to in your letter of request.

Section 11235, R. S. Mo. 1939, provides that the collector of the city of St. Louis shall collect the state taxes in the same manner and to the same extent and do and perform all other things appertaining thereto, as fully to all intents and purposes as now required, or as may be required, of the county collectors.

For the purposes of this opinion it is unnecessary for us to set forth the above statutes.

It will be observed, by the provisions of Subdivision (4) of the Soldiers' and Sailors' Civil Relief Act, quoted above, that the Federal statute has placed on the delinquent taxes a limitation of six per cent interest per annum, and provides that no other penalty or interest shall be incurred by reason of such nonpayment of taxes by one who comes within the provisions of the Soldiers' and Sailors' Civil Relief Act in respect to all real property owned and occupied for dwelling or business purposes by a person in military service, or by his dependents at the commencement of his period of military service and so occupied by his dependents or employees.

We think that the Federal legislation excusing the payment of penalties or interest by the Federal government is paramount to the state in that respect and that the limitation of six per cent interest applies all over the United States, but if the Legislature of any state desires to adopt a more generous attitude to those in the military service it may do so.

Section 11085, R. S. Mo. 1939, provides in part as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year:

Provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation. * * *

The first proviso in the above section has been on the statute books of the State of Missouri since 1872, and our Legislature, in its wisdom and generosity, has seen fit to waive the payment of the "additional tax, as penalty" provided for in Section 11124, R. S. Mo. 1939, as we hereinafter will show.

While the first proviso uses the term "interest" the courts have construed that word, under analogous circumstances, to include the term "penalty." In other words, any additional costs that may be placed on the taxpayer because he has permitted his taxes to go delinquent, whether it be classified as fees, commissions, penalty or interest, is held to be a penalty. We quote extensively from the case of State v. Koeln, 61 S. W. (2d) 750, 1. c. 753, as sustaining this statement, the following:

"* * * We will now consider the several imposts as laid by statute upon the property of the delinquent, in their relation to the delinquent. Unquestionably they impose a duty, moral and legal, upon him in the interest of the public welfare. He is required to pay them, whatever the names they bear; they are imposed upon his property as a punishment to him as well as for the purpose of general deterrence of delinquency. They are essentially of a penal nature, since they imply punishment. They are, one and

all and indiscriminately, 'costs' to the delinquent. Also by statutory classification the respondent's 'commission' of 2 per cent. on delinquent taxes collected is 'penalty' as against the relator, required to be added to the tax bill and collected from the party paying such tax 'as a penalty in the same manner as other penalties are collected and enforced.' Thus the penalty exacted of the relator is by the statute (section 9935) required to be accounted for by the respondent along with the interest penalty of 1 per cent. per month imposed by section 9914, supra. These observations apply also to the city comptroller's fee of 25 cents per tract provided for and required 'to be taxed as costs and collected from the party redeeming such tract.' Not only is the fee an incident and part of the penalty exacted from the delinquent, but considered as costs eo nomine it is essentially penal. It is said in 15 Corpus Juris at page 19, right column: 'In their origin costs were known as a punishment of the defeated person * * * rather than as a recompense to the successful party. * * * The latter theory obtains * * * in the legislation in regard to it.' In volume 7 of Ruling Case Law, page 780, it is stated that 'the terms "fees" and "costs" are sometimes used interchangeably as having the same application.' 'Strictly speaking the two terms are not synonymous. The term "costs" includes fees and reimbursements consisting of fixed and unalterable amounts previously specified by laws, regulations or tariffs,' etc. 15 C. J. p. 21, top 1 col. It follows that as used in the chapter on taxation in the Revised Statutes the expressions 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty.'

"With regard to what may be called the interest penalty, this court in *banc*, in *Seaboard National Bank v. Wooston*, 176 Mo. 49, loc. cit. 62, 75 S. W. 464, held, that the statute (now section 9914) does not change the character of the imposition; that it is not an 'additional tax' at all, for regarded as a tax it would or possibly might be illegal, as the amount of the taxes that the Constitution permitted had already been levied; and that it is not 'interest' in any proper sense, because it is a penalty imposed for a failure to discharge a duty that can be lawfully demanded. See, also, *St. Francis Levee District v. Dorroh*, 316 Mo. 398, loc. cit. 410-413, 289 S. W. 925; 4 *Cooley on Taxation* (4th Ed.) Sec. 1821, p. 3573; *State ex rel. Gold Mines v. Superior Court*, 93 Wash. 433, 161 P. 77; *Jones v. Williams* (Tex. Sup.) 45 S. W. (2d) 130, 136, 79 A. L. R. 983, and cases there cited. And the same rule applies to other burdens imposed by statute for the nonpayment of delinquent taxes, which being in the nature of penalties (*State ex rel. v. Coos County*, 115 Or. 300, 237 P. 678, 679; *Colby v. Medford*, 85 Or. 485, 487, 167 P. 487; *Jones v. Williams*, *supra*) clearly come within the broad scope of the word 'penalties,' which is defined as 'an exaction in the nature of a punishment for the non-performance of an act, or for the performance of an unlawful act, and involving the idea of punishment, whether enforced by a civil or criminal action or proceeding.' *Law Dictionary*, Ballentine, p. 948; *Hall v. Norfolk & W. R. Co.*, 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757."

The courts have held that a liberal construction must be placed on statutes for relief of soldiers and sailors,

and we quote from 130 A. L. R., page 776, as follows:

"It has been held that it was not the legislative intent that the remedial purpose of the Soldiers' and Sailors' Civil Relief Act should be defeated by a narrow or technical construction of the language used. Thus, in *Clark v. Mechanics' American Nat. Bank* (1922; CCA 8th) 282 F. 589, it was held that a statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed by the exacting duties required of him, and unable to give attention to matters of private business. * * * *

In your letter of request you have referred to the Federal Soldiers' and Sailors' Civil Relief Act and also you have enclosed a copy of the opinion of the City Counsellor's office of the city of St. Louis, which refers only to the Federal Act. We think that the state law, namely, the first proviso in Section 11085, supra, must be considered on this question. This state has seen fit to forego the collection of interest from those "who are absent from their homes, and engaged in the military service of this state, or, of the United States"; that is, those who come within the first proviso of said Section 11085, supra.

Since the court in the above opinion has classified the collector's commission of two per cent on delinquent taxes collected as "penalty" as against the taxpayer and, further, states that "in the chapter on taxation in the Revised Statutes the expressions 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty,'" we are constrained to hold that the collector is not entitled to charge the persons who are absent from their homes, and engaged in the military service of this state, or of the United States, the two per cent commission for collecting delinquent taxes, and is not permitted to add said commission to the tax

bill. And, since he is not permitted to charge the two per cent commission on delinquent real estate taxes, we do not think he is entitled to deduct it from any other portion of the taxes paid by those who are entitled to be excused from paying interest by reason of military service. It will be noted that Subdivision 4 of Section 151 of the Federal Act, quoted above, provides that "no other penalty or interest shall be incurred by reason of such nonpayment" and, since a commission, as used in our tax statutes of Missouri, is a penalty, we do not think the collector could charge a person in the military service such commission.

CONCLUSION

It is, therefore, our opinion that the collector is not permitted to add two per cent commission for collecting delinquent taxes from those engaged in the military service, that is, those who come within the provisions of Subdivision 1 of Section 151 of Article V of the Soldiers' and Sailors' Civil Relief Act as set out above.

It is further our opinion that the collector is not entitled to deduct a two per cent commission from any other portion of the taxes that may be collected from those who come within the provisions of the foregoing subdivision.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:CP

COUNTY May not reduce interest on outstanding loans
COURT: and may not change school fund mortgage by
attaching "writer" to the mortgage.

June 24, 1943



Mr. Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

This will acknowledge receipt of your letter of recent date in which you request an opinion from this department and the basis of your request is as follows:

"The County Court of this County finds that the money in the school fund is accumulating so rapidly that they are unable to keep it loaned out at the present rate of interest they are charging. The Court would like to reduce the interest rate on all loans made from now on and at the same time reduce the interest on outstanding loans to the same rate. The question they are asking is, in order to reduce the interest on outstanding loans will they have to call in the loan and re-finance going through the complete formula of bringing the abstract down to date or can they attach a writer to the outstanding note stating that from this date the note will bear the reduced rate of interest?

"I am not sure, personally, that the Court has the authority to reduce the interest rate on outstanding

loan. At any rate you can gather from my questions what the Court has in mind and the desired opinion from your office as to whether or not under the law they are permitted to take this procedure of reducing interest rate on outstanding loans."

Directing our attention to the statutes and decisions which concern the county court and its administration of the school funds, we find that by Section 10378 R. S. Mo., 1939, the court is given jurisdiction of county school funds. We do not quote this section and merely cite the leading case, Saline County v. Thorp, 88 S. W. 2d 183, 337 Mo. 1140.

In Section 10376 R. S. Mo., 1939, the duty of the county court with respect to the administration of county school funds is set out, and we quote this section in full:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and

forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Security for the loans and the administration and procedure required is found in Section 10384 R. S. Mo., 1939. Because of its length we do not quote this section, but merely cite same for your convenience.

Now turning to the section which provides for additional security, which in the discretion of the court might be required, we find that Section 10386 R. S. Mo., 1939, provides the right of the court to exercise its judgment whenever it deems it necessary to require additional security for the better preservation of school funds. These latter sections of the statutes are noted for the purpose of showing the extreme care required by the county court in its administration of these funds.

As to the security of school fund loans we find this provision in Article XI, Section 10 of the Missouri Constitution, page 156c:

"All county school funds shall be loaned only upon unencumbered real

estate security of double the value of the loan, with personal security in addition thereto."

A provision for the order of sale under a general power to sell may be found in Section 10387 R. S. Mo., 1939. This section provides a detailed foreclosure procedure in the event a school mortgage shall become due and payable. Article VI, Section 36 of the Missouri Constitution at page 121c reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The county courts, as such, have limited jurisdiction, and, being creatures of statutory origin, have no common law or equitable jurisdiction. Because of their statutory origin these courts have only the authority to do what is permitted by statutes. Sustaining this thought are the decisions in *St. Louis v. Menke*, 95 S. W. 2d 818, and *State ex rel. Johnson*, 138 Mo. App., 1.c. 314.

Supporting the proposition that county courts are not general agents of the counties of the State but are courts with limited jurisdiction and any acts outside of their statutory authority are null and void are the decisions in *Boyles v. Gibbs*, 158 S. W. 590, 251 Mo. 492; *Sturgeon v. Hampton*, 88 Mo. 203; *King v. Maries County*, 249 S. W. 418, 297 Mo. 488; *State ex rel. Clin-*

ton County Court, 185 S. W. 1149, 193 Mo. App. 373.

The question of the duties of the county court with respect to loans has been before the courts of this State many times, and in *Montgomery County v. Auchley*, 15 S. W., 1.c. 629, 103 Mo. 492, 508, we find the following:

"In *Veal v. County Court*, 15 Mo. 412, the county court had loaned school funds at ten-per-cent. interest, and afterwards, on the petition of the inhabitants of the township to which the funds loaned belonged, the court reduced the rate of interest to six per cent. This court held that this order reducing the interest was illegal, and Judge Scott, in referring to these funds and the nature of the trust assumed by the county courts, in regard to them, said: 'In relation to these funds the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and interest of these funds. If they can give away the one, they can give away the other.* *
* The welfare of the state is concerned in the education of the children. She has provided and is providing means for that purpose, not only for those now in existence, but for those who may come after them. The fund, as has been said, is a permanent one, and, if every man, woman and child in a township should petition the county court

to give away, that which is by law intrusted to it for the education of its children, it should without hesitation reject their prayer.'"

In this decision Thomas, J., makes this observation:

" * * * * * We deem it a wholesome rule to hold county courts to a strict performance of their duties in the management of this trust. With all these stringent provisions large sums of these moneys are frequently lost through negligent management. We would regard it as hazardous to lay down the doctrine that county courts may delegate the power to approve a loan and the security for a loan.*
* * * * *

See also Diffenderfer and others v. Board (St. Louis Public School) 25 S. W., 1.c. 544.

A decision in point Veal v. Chariton County, 15 Mo. 412. In this case the county court had loaned school funds at ten per cent and afterwards, on the petition of the inhabitants of the township, the court reduced the rate of interest to six per cent. This decision also cites the following cases: Board v. Boyd, 58 Mo. 276; Jones v. Mark, 53 Mo. 147; Montgomery County v. Auchley, 92 Mo. 126, 4 S. W. 425; Ray County v. Bentley, 49 Mo. 236.

Mr. Charles S. Greenwood

-7-

June 24, 1943

CONCLUSION

From the above and foregoing it is therefore the opinion of this department that the county court has no authority to reduce the interest on an outstanding school fund mortgage loan nor does the court have the authority to change the terms and conditions of the mortgage and note by attaching a "~~writer~~" to the mortgage already in force. The court may in its discretion "diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security" on any new loans.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:FS

SCHOOLS: Shall purchase from building fund addi-
BOARD OF tional land required for proper sanitation
DIRECTORS: of school house.

July 27, 1943

7/27



Mr. W. E. Gray, President
Oak Grove School Board
R. F. D. 9
Springfield, Missouri

Dear Mr. Gray:

This will acknowledge receipt of your letter of recent date, the full text, omitting caption and signature, is as follows:

"A sanitary condition at our School makes it necessary that we enlarge our sewerage disposal field.

"We are at present unable to purchase any additional land from our incidental funds, however we are in position to purchase the necessary land from out of the School Building Fund if this may be done legally.

"Will you please advise as to purchasing land for such purposes with School Building Fund money."

An examination of the laws applicable to all classes of schools shows at Section 10337 R. S. Mo., 1939, this language:

"The board of directors or board of education shall have the care and keeping of all property belonging to

July 27, 1943

the district, and shall provide the necessary globes, maps, charts, apparatus, supplementary books, and other material for the use of the school. The board shall keep the schoolhouses and other buildings in good repair, the grounds belonging thereto in good condition, and shall provide fuel, heating apparatus, and other material and appliances necessary for the proper heating, lighting, ventilation and sanitation of the schoolhouses; shall have the floors swept and the fires made at the expense of the district, and cause an accurate account of the expense thereof to be kept and a report of the same to be made at the next annual meeting. * * * * *

As your letter does not specify whether or not school district No. 90 is a consolidated district, for the purpose of this opinion we will assume that the same is not a consolidated district, and that the laws applicable to all classes of schools will apply. At Section 10366, we find detailed provisions for school moneys. Because of its extreme length we do not quote the statute in full. It provides that all moneys arising from taxation shall be paid out only for the purposes for which they are levied and collected. This section provides for the following different funds: teachers', incidental, building, free textbook, sinking, and interest. That portion of the statute useful to us further provides that all money derived from taxation or received from the state for building purposes from sale of school site, schoolhouse or school furniture from insurance and sale of bonds shall be placed to the credit of the building fund. The statute is clear and unambiguous and sets out specifically the manner and means for the distribution of school funds coming into the hands of the school directors.

July 27, 1943

Turning now to Section 10429 R. S. Mo., 1939, which involves the payment of indebtedness, we find the exact language of the statute to be as follows:

"Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of of a schoolhouse for said district—the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund: * * * * *

(Emphasis ours)

The statutes above quoted seem to be clear and unambiguous and need no interpretation, and therefore we conclude as follows:

CONCLUSION

The board of directors of a school district shall provide for the proper sanitation of the school house and may purchase from the building fund additional land adjoining

Mr. W. E. Gray

-4-

July 27, 1943

school premises for the purpose of providing for proper sanitation arrangements necessary in the conduct of school affairs. We further conclude that the only fund available for the purchase of this additional property is the building fund and in no instance can the incidental funds be used for such purposes.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

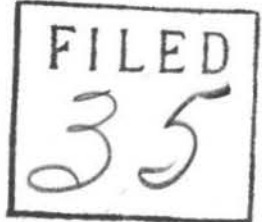
APPROVED:

ROY MCKITTRICK
Attorney-General

LIM:FS

DRAINAGE DISTRICTS:) Not responsible for upkeep of their bridges
ROADS AND BRIDGES:) after expiration of charter; authorities
whose duty it is to maintain road on which
bridge is constructed by drainage district
may repair and maintain such bridge.

December 20, 1943



Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

The Attorney-General wishes to acknowledge receipt of your letter of December 17th in which you request an opinion of this Department. Your opinion request, omitting caption and signature, is as follows:

"Our County Court here has requested me to get an opinion from you on the following proposition.

"On the 14th day of April, 1917, in the Circuit Court of Livingston County, Missouri, the following order was made incorporating the Cream Ridge Drainage District. 'Wherefore, it is ordered, adjudged and decreed that the foregoing described lands and other property in said proposed drainage district be, and the same is hereby organized, formed and incorporated into and is hereby declared a Drainage District under the provisions of the Statutes of the State of Missouri, enacted by the 47th General Assembly, approved March 24, 1913, and found on pages 232 to 267, both pages included, of the laws of Missouri, 1913; and the name of the said corporation shall be the Cream Ridge Drainage District, and the said corporation shall continue for a period of twenty-five years.'

"This district has not functioned for sometime and at the expiration of the twenty-five years from the date of incorporation its indebtedness

shows all paid and its bridges in good shape. Since the date of expiration a bridge has washed out and the question in the mind of the Court is whether or not the County is now responsible for replacing or repairing this bridge. The district takes the position that the corporation has expired by limitation of time though no action was ever taken to terminate or wind up the affairs of the district.

"May I have your answer at your earliest convenience as to who is responsible in this matter."

Section 12324, R. S. Mo. 1939, provides the manner in which drainage districts organized under the circuit courts in this State are to be formed. This section of the statute, and sections following, are the laws under which the drainage district in question was formed twenty-five years ago. Section 12324, aforesaid, is a lengthy section and there is only part of it which is relevant to the question; consequently, we will only cite that part, as follows:

"The owners of a majority of the acreage in any contiguous body of swamp, wet or overflowed lands, or lands subject to overflow, situate in one or more counties in this state, may form a drainage district for the purpose of having such lands and other property reclaimed and protected from the effects of water, for sanitary or agricultural purposes, or when the same may be conducive to the public health, convenience or welfare, or of public utility or benefit, by drainage or otherwise, and for that purpose they may make and sign articles of association, in which shall be stated: The name of the district, and the number of years the same is to continue; * * * * *

(Underlining ours.)

It will be noted that in the formation of the Cream Ridge Drainage District that the order set out in your request and made

by the Circuit Court, provides as to the name of such corporation and that it should exist for a certain specified period of time, to-wit, twenty-five years.

We next wish to cite you to Section 12326, R. S. Mo. 1939, which is another lengthy provision, and we again will only cite that part which is pertinent to this issue. This part provides as follows:

"* * *, the circuit court shall by its order, duly entered of record, duly declare and decree said drainage district a public corporation of this state, for a term not exceeding the time mentioned in said articles of association signed and filed. * * * * *

In view of the order of the Circuit Court and the statutes which we have cited, we must reach the conclusion that the Cream Ridge Drainage District was organized for a period of twenty-five years, as stated in the order of the court. For the Circuit Court to incorporate this drainage district for a period in excess of the length of time requested by the parties asking its incorporation, would be to violate Section 12326, supra, since under that section of the statute the court shall not incorporate for a period longer than requested. Therefore, we reach the conclusion that, since this drainage district was organized and incorporated on the 14th day of April, 1917, and since the period of time for which it was incorporated was set by the court at twenty-five years, the original charter and permit of this drainage district under the Circuit Court expired on the 14th day of April, 1942. We will assume, for the purpose of this opinion, that there has been no effort made to extend the period of incorporation of this drainage district and that no order granting such extension has been made.

We next wish to cite you to 14A C. J., page 1099, Section 3689, entitled "Limitation of Term." This reads as follows:

"After the period of existence of a corporation has expired by force of express provision in its charter, or in a general law, and in the absence of any statutory provision authorizing its extension or continuance, it becomes ipso facto dissolved, and no longer has any existence at all, either de jure or de facto, for

there is no law under which it can longer exist."

Along this line we would also like to cite you to the case of Meramec Spring Park Co. v. Gibson, 188 S. W. 179, 1. c. 181 (Mo. Sup.), wherein the court made the following statement:

"Did it so far expire by statutory limitation as that it could not be sued as a corporation 22 years after its attempted organization? We think that this question must be likewise answered in the affirmative. It has been held in this state under our statute (section 19, G. S. 1865) that after the expiration by statutory limitation of a corporation's life, its property goes to its directors as trustees for the stockholders, and does not, as at common law, revert to the grantor (Bradley v. Reppell, 133 Mo. loc. cit. 552, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; Richards v. Coal Co., 221 Mo. loc. cit. 158, 119 S. W. 953). From this alone it follows on principle that the defunct corporation could not be sued after its dissolution and death by the expiration of its charter; in such wise, at least as to foreclose a lien against lands it no longer owned, but which by operation of law had passed to its late directors as trustees for its shareholders. For the corporate entity is dead ipso facto (10 Cyc. 1271) when its statutory years are accomplished and its holdings of whatever sort, by force of the statute, pass to others (section 19, p. 329, G. S. 1865; Bradley v. Reppell, 133 Mo. loc. cit. 552, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; McCoy v. Farmer, 65 Mo. 244)."

We, therefore, must conclude that the Cream Ridge Drainage District existed for the period of time specified by the Circuit Court in which it was organized, and under the decisions cited above we further necessarily must conclude that this drainage district is no longer in existence. It is true that there are certain ways in which a corporation of this type may be dissolved.

We find under Section 12361, R. S. Mo. 1939, that at any time during the corporate life of such drainage district, when all outstanding bonds shall have been paid and when all other indebtedness of said district shall have been paid or when there is sufficient money on hands to pay any and all outstanding indebtedness, and when there is sufficient money on hands to pay the costs of dissolution of said corporation as therein-after provided, the board of supervisors may, and on a petition of one-tenth of the land owners, shall, call a meeting of the land owners in such district for the purpose of determining whether or not said district shall be dissolved and its corporate life terminated. However, it will readily be seen that this section is for the purpose of dissolving a corporation of this kind during the time that its corporate charter is in effect, and not, as in the instant case, when the charter has expired due to the fact that the time for its existence has elapsed.

We also note from your request that at the time of the expiration of the twenty-five years, the Cream Ridge Drainage District had paid all of its indebtedness and the bridges constructed by it were at that time in good condition. The question now arises as to who is to repair the bridges constructed by the Cream Ridge Drainage District. For answer to this problem we wish to cite you to Section 12354, R. S. Mo. 1939, and, as in the former provisions we cited you, this section is long, so we will cite only the part which we feel will have any bearing upon the question in hand. In speaking of new bridges and enlargements, we find the following provision:

"* * *, and after such bridge has been constructed it shall become a part of the road over which it is constructed and shall be maintained by the authority authorized by law to maintain the road of which it becomes a part. If said bridge has been constructed by the drainage district and has become a part of said road and is then destroyed the authorities having control of the road are authorized, if they desire, to reconstruct such bridge: * *"

In other words, if the Cream Ridge Drainage District constructed bridges on certain roads and across certain ditches, under this section these bridges become part of the road, and if the authorities, or the County Court in this case, wanted to repair these bridges they are authorized under this section of the statute to do so. This Department feels that the only way that the bridge

December 20, 1943

in question can be repaired, is by the action of the County Court, as this is a county road. The Cream Ridge Drainage District is out of existence and certainly they cannot be any longer charged with the duty of repairing bridges which by statute have become a part of the county road system.

Conclusion

Therefore, it is the opinion of this Department that in view of the fact that the Cream Ridge Drainage District is out of existence due to the expiration of its charter, and that at the time of its termination its indebtedness was paid and its bridges were in good repair, and further in view of the fact that by statute bridges constructed by such drainage district become a part of the road on which they were constructed, that the Cream Ridge Drainage District is no longer responsible for the upkeep and maintenance of bridges constructed by it. It is further the conclusion of this Department, that if the bridge in question has been constructed on a county road, it has become a part of such road and the authorities charged with the duty of maintaining such road may repair such bridge.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

CIRCUIT CLERK: Fees for special recordings are non-accountable.

April 23, 1943

5/6



Hon. Max E. Hall
Clerk of Circuit Court
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

Under date of April 6, 1943, you wrote this office requesting an opinion as follows:

"When the Circuit Clerk records an Order of Publication in the Vacation Court Record, in a Civil Suit, for the purpose of obtaining service on a non-resident, or unknown defendants, etc., please advise us what fees are taxed for same. Does Circuit Clerk retain any of this fee?

"The former Clerk here has taxed,
Order for Publication \$.30
Issue Publication 1.00
Record Publication 1.00

"He has retained the latter fee of \$1.00, for recording this publication to obtain service as his own personal fee, and the other \$1.30 cents he turned in as an accountable fee to the county. The way we understand this is, that the above would come under Section 13296, Revised Statutes of Missouri, 1939, and would be an accountable fee, but if the party would make a request for this paper or roll, to be recorded in the Vacation Record so as to have a complete record, other than the original, then the Clerk would receive a fee under Section 13297, Statutes as above, of 10 Cents per hundred words for recording same and it would be a non-accountable fee."

The salary of Circuit Clerks is fixed by Section 13408, R. S. Mo., 1939. This section begins as follows:

"The clerks of the Circuit Courts shall receive for their services annually * * * *
* * * (here follows the salary brackets)

The section applies also to Circuit Clerks who are ex officio recorder of deeds and the section further contains the following provision:

"* * * Provided, that in any county wherein the clerk of the circuit court is ex officio recorder of deeds, said offices shall be considered as one for the purpose of this section: Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided:
* * * (Under scoring ours)

Section 13408 was enacted by the general assembly in 1937. Prior to that time, for a few years, Circuit Clerks were paid on a fee basis. Section 13408 was the second section of

House Bill 177, Section I of the Bill repealed Sections 11786, 11808, 11811, 11812, 11813 and 11814 as enacted by the 57th general assembly in 1933. At the same time Section 13436, relating to the fees of the office of the Clerk of the Circuit Court, was enacted as fifth section in the Bill. This Section is as follows:

"It shall be the duty of the clerks of all circuit courts to charge and collect for the county, in all cases, every fee accruing to their offices under the provision of sections 13407, 13409, and 13410, or any other statute, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 13398. Such clerk shall, at the end of each month, file with the county clerk a report of all fees paid and accruing to his office during such month, the date of accrual to be determined as the date of the final disposition of the case, stating the title of the case or on what account such fees were charged, together with the name of the persons who are liable for same, with the names of all sureties, where security of costs have been required, and which report shall also show what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection, and further stating that, after due diligence, he has been unable to collect the fees reported unpaid and which said report shall be verified by the affidavit of such clerks. And monthly, such clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided

by law. It shall be the duty of the county court to examine such monthly reports and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

Sections 13407, 13409 and 13410, mentioned in this section prescribe fees to be charged by clerks of Circuit Courts, in civil suits, criminal proceedings and naturalization proceedings respectively. At the times both of the amendments to the Circuit Clerks Compensation Act, 1933 and 1937, were passed, what is now Section 13297 was an existing statute and was Section 11678 R. S. Mo., 1929.

Section 13297 mentioned herein is as follows:

"All clerks of the circuit court shall receive as compensation for recording papers under section 13296 of this article the sum of ten cents per one hundred words, to be retained by said circuit clerks, and said clerks are not required to account for same in their annual or quarterly settlements."

Section 13296 referred to in Section 13297 commences as follows:

"In all civil actions any party interested therein may, upon payment of the fees, have any or all of the following papers recorded in the office of the clerk of the circuit court in the county in which such action is brought: * * *"

These last two sections contain the authority for making special recordings and charging fees for such recordings, which fees are the subject of your inquiry.

At first glance, it might seem that Sections 13408 and

13436 had repealed, by implication, the clause of Section 13297, making the fees for special recordings non-accountable fees. For the reason that by the terms of the provision quoted from Section 13408 and underscored and Section 13436, the Circuit Clerks who are ex officio recorders and Clerks who are not ex officio recorders are required to collect and account for every fee accruing to the office under the provisions of Section 13426 or any other statute and Sections 13407, 13409 and 13410. Section 13426 prescribes the fees which a recorder of deeds shall charge so that this clause treats only of the fees which shall be charged, collected and accounted for by a Circuit Clerk, who is ex officio recorder, for services as recorder of deeds. The other three Sections, 13407, 13409 and 13410, treat of fees to be charged for services as Clerk of the Court in connection with litigation.

The fees prescribed in Sections 13407, 13409 and 13410 are for services that are essential to the carrying on of the business of the office and which are necessary to the proper conduct of the litigation.

It might be said that Section 13408 and 13436, being later sections, would take precedence over any portion of 13297 if there was any conflict between the sections. However, Sections 13408 and 13436 are general sections treating of all the whole compensation of Circuit Clerks and the fees to be charged for services necessary to litigation, and Section 13297 is a special section fixing compensation for an optional service which a litigant may request if he so desires, but which service is not necessary.

In House Bill No. 177 of the 57th general assembly express mention is made of certain statutes which are repealed and for Sections 13408 and 13436, which were a part of House Bill No. 177 of the 57th general assembly, to take precedence over what is now Section 13297, it would be necessary to hold that these sections repealed, by implication, any conflicting portion of Section 13297. Repeals by implication are not favored.

State ex rel. Wells vs. Walker, 34 S. W. (2d) 124.

State ex rel. R. Newton McDowell Inc., vs. Smith
62 S. W. (2d) 50.

Further, in order that a repeal by implication may exist it is necessary that an irreconcilable conflict exist between the two statutes, R. Newton McDowell Inc., vs. Smith, 62 S. W. (2d) 50. And the law does not favor repeals by implication if by any

April 23, 1943

fair interpretation the two sections can stand together, there is no repeal by implication.

Briefly summarizing, we have three statutes treating of the compensation of Circuit Clerks and their fees. An earlier special statute fixing a non-accountable fee which the clerks may collect and retain for rendering to a litigant an optional service, and two later general sections fixing annual compensation for the clerks services and requiring the Clerks to charge, collect and account for fees. At first glance, there appears to be a possible conflict between these sections, but the earlier special statute would remain an exception to the later general statutes and the later general statutes would not repeal by implication the earlier special statute if by any fair interpretation the two could stand together. McDowell, Inc., vs. Smith, supra.

It is the view of the writer that Sections 13408 and 13436 do not have the effect of repealing, by implication, any portion of Section 13297 for the reason that the charge fixed by 13297 is for an extra service which is not necessary to the making of a complete record of a case in the office of the Circuit Clerk, but is for a service which has been authorized to be furnished at the option of a litigant, and which service is in the nature of an added duty, outside the scope of the duties of the office.

Sections 13407, 13409 and 13411, R. S. Mo., 1939, fixes the fee that may be charged and collected by Clerks of the Circuit Courts for services as clerks. These fees are accountable fees. A search of these sections fails to reveal any charge fixed for making special recordings.

CONCLUSION

It is, therefore, the conclusion of the writer that the fees authorized to be charged and collected for special recordings, by Section 13297, remain unaccountable fees which the Clerk may retain for rendering a requested service, and these unaccountable fees need not be included in the annual or quarterly settlements.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

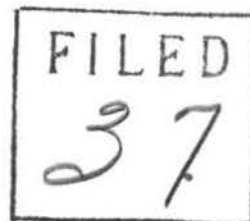
APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

LIEUTENANT GOVERNOR: Power of Lieutenant Governor to vote
SENATE: and debate in the Senate.

January 5, 1943



H onorable Frank G. Harris
Lieutenant Governor of Missouri
Jefferson City, Missouri

Dear Sir:

You have requested that we give our opinion on the following question: When or on what occasion may the Lieutenant Governor give a casting vote?

The consideration of this question requires a review from the beginning of this power of the Lieutenant Governor. The Journal of the Constitutional Convention of 1820 on page 20, shows that a draft of the constitution relating to the executive department was up for third reading. Section 17 was read as follows (p. 21):

"The Lieutenant governor shall by virtue of his office, be president of the senate, have a right when in committee of the whole, to debate and vote on all subjects; and when the senate are equally divided, shall give the casting vote, and in all cases of joint vote of both houses of the general assembly, where there is an equal division, he shall in like manner give the casting vote."
(Underscoring Ours)

At this point the Journal shows:

"A motion was made by Mr. Ramsay, to strike out the words 'and vote,' which was negatived."

Thereupon the section as read was agreed to by a vote of 23 to 12. On page 39 of the Journal, the Section 17, supra, was then referred to as Section 15 and "amended by striking out the words 'and vote,' and the section as amended was agreed to."

The fire of 1837 destroyed all records of this State relative to this convention but there is, at present, in the Secretary of State's office, what purports to be a photostatic copy of the copy of the 1820 Missouri Constitution, filed in the Library of

Congress in Washington, D. C. That copy shows the final draft to which is appended the signatures of the members of the Convention, in so far as Section 17, supra, is concerned to be as follows:

"The lieutenant governor shall by virtue of his office, be president of the senate. In committee of the whole he may debate all questions; and when there is an equal division, he shall give the casting vote in the senate, and also in joint vote of both houses."

We are unable to ascertain how these changes occurred.

In the R. S. Mo., 1825 and on through R. S. Mo. 1855, this provision appears as follows:

"The lieutenant governor shall, by virtue of his office, be President of the Senate, In Committee of the Whole, he may debate all questions; and, when there is an equal division, he shall give the casting vote in the senate, and, also, in joint vote of both houses."

Note the difference in capitalization and punctuation.

There is no doubt about the meaning of the 1820 provision as taken from the Journal. Under that section, it is clear that the Lieutenant Governor was entitled (1) to debate all subjects when the Senate was resolved into a committee of the whole; (2) to give the casting vote when the Senate was equally divided (this power appears to be limited to being exercised at those times the Senate is not resolved into a committee of the whole, due to the fact that the power to vote in said committee was expressly stricken by the convention) and (3) to give the casting vote in joint sessions of both houses when there is an equal division.

The section as it appears in the copy of the 1820 Constitution on file in the Library of Congress, while stated more concisely, does not alter the clear meaning as expressed in the Journal of 1820. It is to be noted that, that part of this provision relating to giving the casting vote is set apart from the previous provision on debate by a semicolon. In *Mills v. State Board of Equalization* 33 P (2d) 563, 569, 570 the court had occasion to determine the office of a semicolon. It is said:

January 5, 1943

" * * * 'The comma and semicolon are both used for the same purpose, namely, to divide sentences and parts of sentences, the only difference being that the semicolon makes the division a little more pronounced than the comma.' * * * * *

"* * * * 'The Oxford Dictionary, after defining a semicolon, says that it is used for "marking off a series of sentences or clauses of co-ordinate value." Volume VIII, part II, p. 440. According to this statement of usage, every clause separated by a semicolon * * * is coordinate with each of the others, and therefore must each be read separately * * * * *"

* * * * *

"* * * * 'Agair, Ward's "Sentence and Theme" (Scott, Foresman and Co., 1923) at page 331, says the semicolon "shows that two sentences, each of which should stand alone, have been combined into one sentence;" and continues, "A semicolon is used to show that what follows is grammatically independent, though closely related in thought." * * *"

Applying these rules, it is apparent that the right to give the casting vote is not confined to a time when the Senate is in a committee of the whole, since the clause "and when there is an equal division, he shall give the casting vote in the Senate" being set off from that which precedes it by a semicolon, is to be read as a separate sentence, independent of the preceding clause.

As heretofore shown, the editions of the Constitution, as they are in R. S. Mo. 1825 through R. S. Mo. 1855, have not in punctuation and capitalization been the same in Section 15, Article IV as the copy filed in the Library of Congress. Since those changes have been unauthorized, we shall disregard them.

Out of the 1865 Constitutional Convention came a similar section. It was Section 13, Article V (G. S. 1865 p. 34) and read as follows:

"The lieutenant governor, by virtue of his office, shall be president of the senate. In committee of the whole he may debate on all questions; and when there is an equal division shall give the casting vote in the senate, and also in joint vote of both houses."

This has been compared with the original signed copy on file with the Secretary of State and found to be correct in all respects. Since it is identical in substance with the 1820 provision, we think it is to be given the same construction.

Out of the 1875 Constitutional Convention came a similar section. It was Section 15 Article V (R.S. Mo. 1939 p. 106c) and reads as follows:

"The Lieutenant-Governor shall possess the same qualifications as the Governor, and by virtue of his office shall be President of the Senate. In committee of the whole he may debate all questions, and when there is an equal division he shall give the casting vote in the Senate, and also in joint vote of both houses."

Note the absence of the semicolon after the word "questions." We have checked this absence with the original signed constitution, on file with the Secretary of State, as adopted from the 1875 Convention and find that that draft shows a semicolon after the word "questions." Also see Journal Missouri Constitutional Convention of 1875 (Loeb-Shoemaker) Vol. II page 794 where the version of Section 15, supra, that was adopted, is set forth with the semicolon after the word "questions" (See adoption pages 801, 802)

We therefore think that the same construction applies to the 1875 provision as we applied to the 1820 provision. This view is fortified by what has been said by writers on Parliamentary Law.

In Law and Practice of Legislative Assemblies (Cushing) Section 298, page 115, it is stated:

"* * * In the constitution of the United States and in those of all the States above named, except that of Virginia, (in which it is declared, that the lieutenant-governor shall preside in the senate but shall have no vote therein,) it is provided, that the presiding officer thereby designated shall give the casting vote, when the body over which he presides is equally divided; * * * * *"

Missouri is one of the States above named, to which the author refers. The author continues (p. 116):

"* * * This right of the lieutenant-governor is extended, * * * in Missouri to a joint vote of the two houses. * * * * *"

With reference to the functions of the Lieutenant Governor when the Senate is resolved into a committee of the whole, this author states (page 116):

"* * * In Connecticut and Missouri, the lieutenant-governor is permitted to debate, and in the States of Kentucky, Indiana, Illinois, and Texas, to debate and vote, when the body over which he presides is in committee of the whole. * * * * *"

Thus, this text bears out our view that the Lieutenant Governor in Missouri may debate when the Senate is in committee of the whole, but not vote; that he may vote during sessions of the Senate to give the casting vote in case of an equal division.

In Legislative Procedure (Luce) the author from page 432 to 445, discusses the presiding officer of the Senate and on page 445 concludes:

"In Connecticut, Kentucky, Mississippi, Indiana, Missouri, and Texas the Lieutenant-Governor may debate in Committee of the Whole."

Further discussing the power of Lieutenant Governor to vote, this author after discussing the origin of such powers, states (pages 447-448):

"The first of the State Constitutions to refer to the voting power of the presiding officer in the upper branch was that of New Jersey, which made the Governor the President of the Council, with a casting vote. New York was the first to find employment for a Lieutenant-Governor by making him President of the Senate; upon an equal division, he was to 'have a casting vote in their decisions, but not vote on any other occasion.' This was the only State with any such provision when the Federal Convention met, and so is to be credited with furnishing the idea to the Federal Constitution. The authors of that document preferred to give the voting power to the Vice-President by indirection, saying, he 'shall have no vote, unless they be equally divided.' Hamilton in No. 68 of 'The Federalist' gave as the reason for adopting the New York idea: 'To secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the Senator of any State from his seat as Senator, to place him in that of the President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote.'

"Kentucky was the next of the States to accept the principle. Her second Constitution (1799) made the Lieutenant-Governor the 'Speaker' of the Senate, with a casting vote, and went farther by empowering him, 'when in Committee of the Whole, to debate and vote on all subjects.' Indiana (1816), Mississippi (1817), and Illinois (1818), all copied this. Connecticut (1818) took it with the omission of the power to vote in Committee of the Whole. Missouri (1820) followed the Connecticut modification, and added a casting vote in joint votes of the two Houses. Other States have adopted the system until now, in the thirty-five States that have a Lieutenant-Governor, all but one (Massachusetts) make him the presiding officer of the Senate, and in each case it is specified that he is to have the casting vote or to vote when the Senate is equally divided,

except that in Michigan it is directed that he shall have no vote, and in Minnesota he is made 'ex officio President,' with nothing said about voting."

We think the foregoing disposes of the question, and conclude that in Missouri the Lieutenant Governor has the power to debate, but not vote, when the Senate is in committee of the whole; that he has the power to give the casting vote at sessions of the Senate (not in committee of the whole) where there is an equal division; that he has power to give the casting vote in joint sessions of the House and Senate when there is an equal division. "Casting vote" is defined in Laws and Practice of Legislative Assemblies (Cushing) page 119 Section 303 as follows:

"The casting vote is so called, not because on an equal division the question is decided by it, for, in fact, as we have seen, an equal division upon a question is a decision of it in the negative, but the question is then in such a position, that it is in the power of a single vote to decide the question either way, by being given on that side. Thus, if the votes are equal on each side, the affirmatives do not preponderate, and if there are no more votes to be given, the question must necessarily be held to be decided in the negative; but if there is another vote to be given, that vote must of course be a casting vote, because, on whichever side it is given, that becomes the preponderating side of the question. * * * *"

The above conclusion is subject to only one limitation and that is, the Lieutenant Governor cannot give a casting vote on final passage of bills or resolutions, to which the concurrence of both houses is necessary, and concurrence to amendments by one house as made by the other house. These limitations arise by force of Section 31 Article IV as follows:

"No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor."

And Section 14 Article V, as follows:

"Every resolution to which the concurrence of the Senate and House of Representatives may be necessary, except on questions of adjournment, of going into joint session, and of amending this Constitution, shall be presented to the Governor, and before the same shall take effect, shall be proceeded upon in the same manner as in the case of a bill. Provided, That no resolution shall have the effect to repeal, extend, alter or amend any law."

This latter Section requires resolutions to which the concurrence of the Senate and House may be necessary, "shall be proceeded upon in the same manner as in the case of bills;" thus, according to Section 31, Article IV there must be, on final passage of resolutions of this kind and bills, a favorable vote of "a majority of the members elected to the house" and this excludes the Lieutenant Governor.

The last limitation noted, arises from the provisions of Section 32 Article IV, as follows:

"No amendment to bills by one house shall be concurred in by the other, except by a vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting for and against recorded upon the journal thereof; and reports of committees of conference shall be adopted in either house only by the vote of a majority of the members elected thereto, taken by yeas and nays, and the names of those voting recorded upon the journal."

Hon. Frank G. Harris

-9-

January 5, 1943 .

This makes the same requirement as to the concurrence being by "a majority of the members elected thereto" and thus excludes the Lieutenant Governor.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

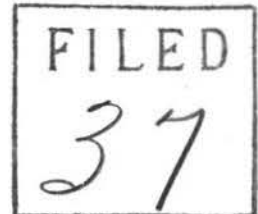
APPROVED:

ROY MCKITTERICK
Attorney General

LLB:AM

BANKS AND BANKING: Interpretation of Sections 7952 and 8032, R. S. Mo. 1939, as amended, relative to the amount banks and trust companies may loan to individuals, partnerships, corporations and bodies politic.

January 22, 1943



Hon. D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Harrison:

This is to acknowledge receipt of your letter of January 16th, 1943, in which you request the opinion of this department. Your letter is as follows:

"This Department has been confronted with the question of whether or not loans secured by pledge of government bonds are exempt from the restrictive provisions of Sections 7952 and 8032, pages 679 and 684 of the Laws of Missouri, 1941.

"We have always interpreted the Sections to mean that they do not make an exception in the case of loans secured by government bonds.

"An opinion from you regarding this matter will be very much appreciated."

Your question is whether there is any exception to the amount that may be loaned directly or indirectly by a bank or trust company to an individual, partnership, corporation or body politic, mentioned in Subdivision 1, Section 7952, R. S. Mo. 1939, as amended by Laws of Missouri 1941, at page 679, pertaining to banks, and Subdivision 1, Section 8032, R. S. Mo. 1939, as amended by Laws of Missouri, 1941, page 684, pertaining to trust

companies, if the loan is secured by the pledging of government bonds.

Sections 7952 and 8032, supra, as amended are similar except that Section 7952 relates to banks and Section 8032 relates to trust companies. The amendments of 1941 of both sections do not in any way affect the question propounded in your request. That part of Section 7952 pertinent to your question provides as follows:

"Restrictions on loans, purchases of securities and total liabilities to banks of any one person. A bank subject to the provisions of this article:

"1. Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letters of credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations of such individual, partnership, corporation or body politic an amount or amounts in the aggregate which will exceed fifteen (15) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over; twenty (20) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of less than one hundred thousand and over seven thousand; and twenty-five (25) per centum of the capital stock actually paid in and surplus fund of such bank if located elsewhere in the state, with the following exceptions: * * * * *

It will be noted that a bank or trust company, as the case may be, is restricted in the amount it may lend directly or indirectly to any individual, partnership, corporation or body politic, to fifteen per centum in the aggregate of

the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over; twenty per centum if located in a city having a population of less than one hundred thousand and over seven thousand, and twenty-five per centum if located elsewhere in the state.

It seems unnecessary in this opinion to set forth the subdivisions describing the various bonds, securities and other evidences of debt to which the restrictions in subdivision 1, as set forth above, shall not apply, for the reason that it occupies four complete pages of Laws of Missouri 1941 (pages 679 et seq.). It will be observed by a reading of the exceptions that they apply when the loan or loans are made directly by the bank or trust company, as the case may be, or the bank or trust company owns outright those securities. Briefly, the bonds, securities and other evidences of debt to which the restrictions in subdivision 1 shall not apply are bonds, securities or other evidences of debt of the government of the United States, or its territorial possessions, or of the State of Missouri, or of any city, county, town, village or political subdivision of this state; bonds, securities or other evidences of debt of any corporation organized under the laws of the United States which are guaranteed; bonds of any state of the United States other than the State of Missouri or the county, city or school district of such foreign state, having a population of more than fifty thousand and which shall not have defaulted for more than 120 days in the payment of its general obligations; or bonds issued by certain designated governmental agencies.

However, the restrictions apply in subdivision 1 when the loan is made to an individual, partnership, corporation, or body politic, even though the loan is secured by government bonds or other evidences of debt of eminent quality. We find that there is no exception to the amount that may be loaned to the borrower. In other words, the gist of the section is that the restriction applies to the amount of the loan and not the quality of the securities pledged to secure the loan.

CONCLUSION

It is, therefore, our opinion that loans secured by government bonds are not exempt from the restrictive pro-

visions of Sections 7952, R. S. Mo. 1939, as amended, relating to banks, or Section 8032, R. S. Mo. 1939, as amended, relating to trust companies.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP

BANKS AND BANKING: The secrecy section of the banking
code does not apply to the annual
SMALL LOAN COMPANIES: reports required to be filed by Small
Loan companies under Section 7885, R.
S. Mo. 1939.

February 16, 1943

Hon. D. R. Harrison, Commissioner
Department of Finance
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of
February 10, 1943, in which you request the opinion of
this department. Your letter reads as follows:

"You will note from Section 8159 of
the Revised Statutes of Missouri, 1939,
that

"Every licensee under this article
shall at such time each year as shall
be designated by the licensing official,
and upon a form to be prescribed by
said licensing official, file with such
official an annual report which shall
include: * * *."

"You will also note by reading Section
7885 of the Revised Statutes of Missouri,
1939, that

"The commissioner of finance, his dep-
uties, clerk, stenographer, each examiner
and every employee shall be bound, under
oath, to keep secret all facts and infor-
mation obtained in the course of all ex-
aminations * * *."

"A request has been made to review the
annual reports of the licensees under the
Small Loan Law on file in this office and

I have taken the position that such reports contain confidential information and are not open to public inspection.

"Will you please furnish me with an opinion as to whether or not the information contained in the annual reports of licensees under the Small Loan Law to be filed in this office should be regarded as secret by the employees of this Department and furnished only when an employee is called as a witness in any proceeding in a court of justice, as provided in Section 7885 of the Revised Statutes of Missouri, 1939."

The question is stated in the last paragraph of your letter. The Small Loan Act was enacted in this state in 1927, and is found at pages 252-258, Laws of Missouri 1927. The Small Loan Act now is Article 7, Chapter 39, Revised Statutes of Missouri, 1939, Sections 8150-8171, inclusive.

Under this law, a licensee may charge interest at a rate not to exceed three per cent per month on loans of \$100 or less, and two and one-half per cent per month on loans of more than \$100 and less than \$300 in principal amount. It further provides that no person, co-partnership or corporation shall engage in the Small Loan business without obtaining a license so to do from the Commissioner of Finance and must give bond in the amount of \$1,000.00, that the licensee will conform to and abide by each and every provision of the Small Loan Act.

The duty of supervising the small loan companies licensed under this act devolves upon the Commissioner of Finance of the state and he is designated as the licensing official.

Section 8159, R. S. Mo. 1939, authorizes the Commissioner of Finance, as the licensing official, to investigate the business and loans of every licensee under this act and

every licensee under this act shall, at such time each year as shall be designated by the licensing official and upon a form to be prescribed by said licensing official, file with such official an annual report which shall include:

1. The total aggregate capital employed by such licensee;
2. The total aggregate number and amount of loans made by such licensee during the year;
3. The total amount of interest collected by such licensee during the year;
4. An itemized statement of expenses incurred in the operation of the business during the year, including the amount and rate of interest paid by such licensee on money borrowed;
5. The number of attachments sued out by such licensee during the year against the salary or wages of borrowers;
6. The number of chattel mortgages foreclosed and the amount received for property sold thereunder by such licensee during the year;
7. Such other and additional information as may be prescribed by the licensing official.

And, with certain penalties to be imposed on the licensee if he does not file such reports with the Commissioner of Finance.

Section 8160, R. S. Mo. 1939, provides that the licensee shall keep such books and records in his place of business as in the opinion of the licensing official will enable the licensing official to determine whether the provisions of this article are being observed.

You desire to know in your request whether the annual reports required to be filed by the small loan companies under Section 8159, must be kept secret by the Commissioner of Finance and the employees of that department, as provided by Section 7885, R. S. Mo. 1939.

There is no special provision in the Small Loan Act itself which provides that the Commissioner of Finance shall not permit the reports filed by each licensed small loan company to be examined by persons other than the Commissioner of Finance and the employees of that office.

In your letter of request you have referred us to Section 7885, R. S. Mo. 1939, which furnishes the basis for your position that the annual reports filed by the small loan companies in compliance with Section 8159, R. S. Mo. 1939, are confidential reports and cannot be examined by persons other than the Commissioner of Finance and the employees of that department. The pertinent parts of Section 7885, R. S. Mo. 1939, provides as follows:

"The commissioner of finance, his deputies, clerk, stenographer, each examiner and every employee shall be bound, under oath, to keep secret all facts and information obtained in the course of all examinations, except so far as the public duty of such officer requires to report upon or take special action regarding the affairs of any bank, savings and safe deposit company or trust company, and except when he is called as a witness in any proceeding in a court of justice.

*****"

Said section provides penalties for violation of its provisions.

That part of Section 7885, R. S. Mo. 1939, quoted above has been a part of the banking code of this state since 1907 (Laws of Missouri 1907, Article XX, Section 8, page 157) and requires that the Commissioner of Finance, his deputies, clerks, stenographers or examiners shall be bound under oath to keep secret all facts and information obtained in the course of all examinations except so far as the public duty of such officer requires a report upon or to take special action regarding the affairs of any bank, savings and deposit company or trust company.

Since the above secrecy section was enacted in 1907 and the Small Loan Act was enacted in 1927, same could not in any way have referred to the Small Loan Law. The inhibition against the disclosing of confidential information specifically refers to banks, savings and deposit companies and trust companies and it will be noted that even after the passage of the Small Loan Law in 1927 there has been no amendment of Section 7885, bringing small loan companies under the provisions of Section 7885, supra.

We have various provisions in our statutes which require the various officers of the state to keep secret confidential matters and records which the law requires shall be filed in their respective offices, and it is significant that no provision of the law requires that the Commissioner of Finance shall keep secret the annual reports required to be filed by the Small Loan companies. In the absence of any statute denying the public the right to inspect public records we must look to ascertain what the rule was at common law.

In 53 C. J. page 624, Section 40, in discussing the rules relative to the inspection of public records, the text says:

"* * * However, there is also authority that the contents of a public record office are always at the service of a person desiring to examine the same on due application to the official in charge, that under the common law in this country every person is entitled to free access and public inspection of public records without any showing of special interest, and that in the absence of a statute public records are open to inspection by the public. * * * * *"

This states briefly the rule as we understand it. There is no question in our opinion, but that there is a common law right of interested persons to inspect public documents and records. This right is based on the interest which the citizen may necessarily have in the matter to which the records relate, and unless the legislature has restricted that right, by statute, the right in the people still remains.

CONCLUSION

It is, therefore, our opinion that an interested citizen has a right at reasonable times to inspect the public records, namely, the annual reports required by law to be filed by the Small Loan companies, under the provisions of Section 8159, R. S. Mo. 1939.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

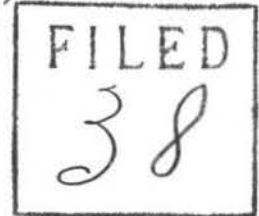
ROY MCKITTRICK
Attorney-General

CRH:CP

EMBALMING: Board may consider application of an individual for
BOARD : re-examination, where his license has been revoked
for cause.
Signing in blank certificates of death and leaving
them with undertaker who is not licensed embalmer,
to be used by him, is cause for revocation of license.

January 6, 1943

Hon. Allen V. Hays, Secretary
The State Board of Embalming
Nevada, Missouri



Honorable Sir:

We acknowledge your letter of December 6, 1942,
requesting opinions, the pertinent part of said letter
being as follows:

"At the direction of the State Board of Embalming I am writing to request of you an opinion as to the status of an individual having had his Missouri Embalmers license revoked, under procedure as outlined under rule 4 of the "Standard of Proficiency". The Board wishes to know specifically whether or not such an individual may be considered eligible to make application for re-examination for a new embalmers license, or if the fact of his original license having been revoked, after citation and hearing as outlined under rule 4, renders him subject to all the rules and requirements as set forth in the Standard of Proficiency, relative to eligibility of applicants (Sec. 10103-Qualification of Applicants).

"Also I am directed to request of the Attorney General an opinion as to the status of a licensed embalmer who signs in blank the form printed on the back of Standard Missouri Certificates of Death, leaving one or a number of such "signed" certificates in the hands of an undertaker who is not a licensed embalmer to be used by him as the need may arise."

Section 10102 of R. S. Mo., 1939, delegates to the State Board of Embalming powers and authority

"to adopt rules and regulations and by-laws, from time to time, not inconsistent with the laws of this state or of the United States, whereby the performance of the duties of said board and the practice of embalming of dead human bodies shall be regulated."

Under the authority given the Board by Section 10102, it appears that the Board has adopted Rule 4, Section 1, which is as follows:

"When written complaint shall be made to the Board against any licensed embalmer in the State of Missouri, charging any misconduct in his professional capacity or for violation of any law or the Standard of Proficiency herein required, the same shall be made under oath. The Board shall investigate the same in a summary manner and shall determine at the earliest possible time whether the complaint is meritorious. If a majority of the Board finds the complaint meritorious and supported by substantial evidence it shall notify the accused by giving him twenty (20) days notice of the filing of such complaint; such notice shall contain an exact statement of the charges and date and place set for a hearing before the Board. If the embalmer thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the Board shall, after receiving legal evidence and proof of said charges, revoke or not renew his license."

From an examination of the booklet entitled "Standard of Proficiency" adopted September 16, 1941 by the Board of Embalming of Missouri, we find no rule has been adopted relating to the consideration of an application of an individual for an embalming license who previously held an embalming license, which license was revoked for cause. In the absence of such a rule, and there being no statute on the question and it appearing that the particular proposi-

January 6, 1943

tion has not heretofore been submitted to the courts for determination, we must consider what would be a fair and reasonable course to pursue.

From your letter, we assume that you refer to an individual whose license has been revoked, because he has violated some of the specific qualification requirements contained in Section 10103 of R. S. Mo., 1939, which reads in part as follows:

"From and after the first day of September, eighteen hundred and ninety-five, every person now engaged or desiring to engage in the practice of embalming dead human bodies within the state of Missouri shall make a written application to the state board of embalming for a license, accompanying the same with the license fee of ten dollars, whereupon the applicant, as aforesaid, shall present himself or herself before said board, at a time and place to be fixed by said board; and if the board shall find, upon due examination, that the applicant is of good moral character, possessed of a knowledge of the venous and arterial system * * * *"

Ordinarily, revocation of a license would not be for lack of knowledge of some of the matters set out in the section above quoted, but because of some act or conduct on the part of the licensee that would convince the Board that he is no longer of good moral character, and it is a matter of common knowledge that one's moral character may become better or worse in the course of time, and there is always the possibility of improvement.

Applicant must always furnish the Board with satisfactory proof of his good moral character.

"The legislature has the same power to require, as a condition of the right to practice the profession, that applicant shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession; and when so required by statute, satisfactory proof of his good moral character must be produced by an applicant to

January 6, 1943

entitle him to a license or certificate.
* * * * 48 Corpus Juris, p. 1090, Section
55.

CONCLUSION TO THE QUESTION PRESENTED IN PARA-
GRAPH 1. OF YOUR LETTER.

It is our opinion that, if an individual whose license has been revoked for cause makes another application for examination for a license, the application must be considered by the Board, and accepted or rejected. It is within the sound discretion of the Board as to how soon after revocation of license they should accord such individual an opportunity to be again examined by the Board, the time to be determined by the gravity of the misconduct for which the individual's license was revoked. If such individual is allowed to take an examination, the burden would be upon him to show that he is now of good moral character, and in all other respects eligible for the license.

The second paragraph of your letter submits a question involving the official act of a licensee which violates the spirit, as well as the letter, of the law relating to the disposal of dead human bodies. It amounts to a delegation by a licensed embalmer of all of the authority he has to an unlicensed person. It would unquestionably be a fraud, and, therefore, a degradation of character.

"It is a mistaken conception of the nature of any calling, professional, commercial, or industrial, that it is invested with such sanctity as to exempt it from reasonable legal regulations. The ever-expanding exercise of the police power manifested in the enactment of regulatory statutes, embracing every possible vocation, demonstrates the fallacy of this conception. The purpose of such statutes is in some instances to encourage efficiency and in others to promote sanitation, whereby in the first incompetency may be eliminated, and in the second the public health preserved . . . A re-examination of one who has permitted his license to expire is not an oppressive requirement or an invasion of an inherent right. It affords the board an opportunity

January 6, 1943

to determine whether, under that feeling of security afforded by a license renewable upon a mere application, the applicant has not become inefficient through mental inertia. The fee required of a first applicant or of one seeking a license after forfeiture is not unreasonable. It is necessary in the economical administration of public affairs that each department created by law should, so far as reasonably possible, be authorized to charge such fees for services rendered as will enable the department to be self-sustaining." State ex rel. Bigham v. State Bd. of Embalmers, 297 Mo. 607, 250 S. W. 44.

The individual, so using death certificates, would be guilty of conspiracy in violation of Section 10106 of R. S. Mo., 1939, which is as follows:

"On and after the first day of September, 1895, it shall be unlawful for any person not a registered embalmer to practice or pretend to practice the science of embalming, unless said person is a registered embalmer within the meaning of this chapter."

"The revocation of a physician's registration for 'having professional connection with, or lending one's name to, an illegal practitioner,' which was defined as unprofessional and dishonest conduct, was upheld in Re Van Hyning (1932) 257 Mich. 146, 241 N. W. 207.

" * * * * *

"Aiding and abetting an unlicensed person to practise a system and mode of treating the sick and afflicted was the ground upon which a physician's license was revoked, in Anderson v. Medical Examiners (1931) 117 Cal. App. 113, 3 Pac. (2d) 344,--where the sufficiency of the accusation and the proceeding in general was upheld, without disclosing the precise nature of the acts upon which the accusation was based,

"But a single episode which happened during the absence of a chiropodist, and without his knowledge or consent, was held not to justify the revocation of his license for aiding and abetting his unlicensed employer in practicing chiropody unlawfully in *Renwick v. Phillips* (1928) 204 Cal. 349, 268 Pac. 368." 82 A. L. R. 1187.

In a case involving the issuance by a physician of 778 blank prescriptions for whiskey, in a local option town, to be used as a beverage, when there was a statute declaring such issuance of prescriptions to be a crime (the conduct involved in the question at hand also is declared to be a misdemeanor by Section 10108) the Supreme Court in holding such acts to be unprofessional and dishonorable conduct stated:

"It needs no citation of authorities to demonstrate that appellant's conduct aforesaid, as disclosed by the undisputed facts in the record, was both unprofessional and dishonorable. In addition to the foregoing, every prescription of above character which appellant signed as physician and delivered, and upon which whiskey was obtained as a beverage, constituted a crime against this State." *State ex rel. A. M. Conway v. F. B. Hillier et al.*, Constituting State Board of Health, 266 Mo. 246, 1. c. 269.

CONCLUSION TO THE QUESTION PRESENTED IN PARAGRAPH 2. OF YOUR LETTER.

We are of the opinion that a licensed embalmer who repeatedly signs in blank the form printed on the back of standard Missouri certificates of death, leaving one or a number of such signed certificates in the hands of an undertaker who is not a licensed embalmer to be used by him as need may arise in the absence of such licensed embalmer would constitute a violation of the law of this state, and would constitute unprofessional and dishonorable conduct, which if proven according to the statutes and Standard of

Hon. Allen V. Hays

-7-

January 6, 1943

Proficiency Rules would justify the board in revoking the license of such practitioner, but we believe that it would take more than a single such act to constitute such professional misconduct as would justify revocation of his license.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

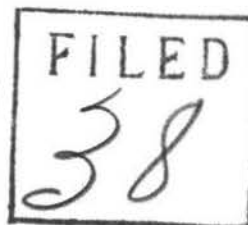
LAP:wb

SOLDIERS:
STATE BOARD OF HEALTH:

Soldiers should not be charged for
certified copies under certain con-
ditions.

February 12, 1943

Mr. Elmer A. Heideman
Department Judge Advocate
Wainwright Building
St. Louis, Missouri



Dear Sir:

Your request for an opinion has been received by
this office.

Your inquiry is whether or not the State Board of
Health should require a fee for the certified copy, or
copies of birth or death certificates which are re-
quired to perfect the claim of any soldier, sailor or
marine, in service, or honorably discharged, or any
dependent of such soldier, sailor or marine, for a
United States pension, or any other claim upon the
Government of the United States.

Section 9781 R. S. Missouri, 1939, partially reads
as follows:

"The State Registrar shall, upon
request, furnish any applicant a
certified copy of the record of any
birth or death registered under pro-
visions of this article, for the mak-
ing and certification of which he shall
be entitled to a fee of fifty cents to
be paid by the applicant. For any
search of the files and records, when
no certified copy is made, the State
Registrar shall be entitled to a fee
of fifty cents for each hour or frac-
tional hour of time of search, to be
paid by the applicant. * * * *"

This section is a general law allowing the State Board of Health a fee for certified copies of a birth or death certificate.

Section 15077 R. S. Missouri, 1939, reads as follows:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

This is a special statute and is only applicable to a soldier, sailor or marine, or a dependent of such soldier, sailor or marine, where the certified copy is required, in order that either of them may obtain a United States pension, or be used as evidence in any other claim upon the Government of the United States.

The two sections above set out relate to the same general subject matter, but Section 15077, supra, specifically applies to soldiers, sailors, marines and their dependents. These two statutes relating to the same subject matter must be read together, and provisions of one having special application to a particular subject will be deemed a qualification or "exception" to the statute general in its terms, such as the general statute allowing the State Board of Health to charge a fee of fifty cents for all birth and death certificates. It was so held in the case of *Eagleton v. Murphy*, 156

S. W. (2d) 683, Pars. 2-3, where the court said:

" * * * Under the established rules of statutory construction where there are two laws relating to the same subject they must be read together and the provisions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act general in its terms. State ex inf. Barrett v. Imhoff, 291 Mo. 603, 238 S. W. 122; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S. W. 129. * * * * *

Section 9781 R. S. Missouri, 1939, is a re-enactment of Section 9060 R. S. Missouri, 1929, which appears in the Laws of Missouri, 1937, page 356. The re-enactment did not repeal Section 15077, supra, which first appears in the Laws of Missouri, 1921, page 660. The re-enactment of Section 9060 R. S. Missouri, 1929, merely changed the section to allow a charge of an additional fifty cents for each hour, or fractional hour spent in research on behalf of the applicant. It further added that no fee should be charged where the certified copy was required to perfect the claim of persons on relief for any claim upon the Government of the United States. In other words, Section 15077, supra, which specifically applies to the soldiers, sailors and marines was a later statute than what is now Section 9781 R. S. Missouri, 1939.

Where a general statute was enacted subsequent to an earlier special statute relating to the same subject matter, the special statute will be construed as an exception to the general statute, unless expressly or impliedly repealed. It was so held in the case of State v. Brown, 68 S. W. (2d) 55, Pars. 4-8, l. c. 59,

where the court said:

" * * * Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tevis et al. v. Foley, 325 Mo. 1050, 1054, 30 S. W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S. W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S. W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special statute, section 5613."

The title to the bill which is now Section 15077, appears in Laws of Missouri, 1921, page 660, and reads as follows:

"SOLDIERS, SAILORS OR MARINES:
Providing that Certified Copies of
Public Records be Furnished Free of
Charge.

"AN ACT providing that certified
copies of public records be fur-
nished free of charge to any sol-
dier, sailor or marine in service
or honorably discharged, or any
dependent of such soldier, sailor
or marine."

The title to an Act of the legislature may be looked to in construing the Act. It was so held in Artophone Corporation v. Coale, 153 S. W. (2d) 343, Holder v. Elms Hotel Company, 92 S. W. (2d) 620, and Thomas v. Buchanan County, 51 S. W. (2d) 95.

Under the title to the Act which is now Section 15077 R. S. Missouri, 1939, there is no ambiguity as to the furnishing free, of certain public records. Of course, it is always a question of fact as to whether or not the records demanded come within the description of the records and their use, as set out in Section 15077, supra. It must be for the purpose of perfecting the claim of any soldier, sailor or marine in service, or honorably discharged, or a claim of any dependent of such soldier, sailor or marine for a United States pension, or any other claim upon the Government of the United States.

We do not hold that there is any ambiguity between the two sections, 9781, supra, and 15077, supra, but where a public officer attempts to charge a fee on a statute where there is some ambiguity, the rule is that the statute is strictly construed against the officer. It was so held in Smith v. Pettis County, 136 S. W. (2d) 282, Pars. 4-6, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * * * *

The general rule is that where a statute does not provide a fee or compensation to be paid to an officer, for performing part of his duties, the performing of the

duties should be deemed to be gratuitous. It was so held in the case of Nodaway County v. Kidder, 129 S. W. (2 d) 857, Pars. 5-8, where the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Section 15078 R. S. Missouri, 1939, reads as follows:

"Any person or persons violating any provision of section 15077 shall be deemed guilty of a misdemeanor."

Mr. Elmer A. Heideman

-7-

February 12, 1943

Under this section it is a misdemeanor for a public officer who has charge of the records pertaining to claims, as set out in Section 15077, supra, to charge for certified copies.

CONCLUSION

It is, therefore, the opinion of this department that the State Board of Health cannot charge for furnishing a certified copy of a birth certificate, death certificate or any other copy in its charge, where the same is required to perfect the claim of any soldier, sailor or marine, in service, or honorably discharged, or any dependent of such soldier, sailor or marine for a United States pension, or any other claim upon the Government of the United States.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

PROSECUTING ATTORNEY: Not entitled to fee for examination of
abstract from person making application
SCHOOL LOANS: for school fund loan.

April 5, 1943

4-21



Honorable James P. Hawkins
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Sir:

This office is in receipt of your letter of April 1st requesting an opinion upon the following question:

Whether a prosecuting attorney is entitled to charge a person, making application for a school fund loan before the county court of his county, a fee for the examination of an abstract of title.

In view of the fact that this question has been answered by this office on several occasions for various prosecuting attorneys of the state, and due to the interest of the county courts of the various counties, it is felt necessary to go into the matter at some length with the idea in mind of outlining, first, the duty of a county court with respect to school fund mortgage loans, and, second, the duties of a prosecuting attorney concerning the same mortgage loans.

I.

Under the statutes of our state, it is the duty of the several county courts to diligently collect, preserve and securely invest money and other property belonging to the county school fund. This authority is set out in Section 10576, R. S. Missouri, 1939, which reads as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

We find further that Section 10383, R. S. Missouri, 1939, reads as follows:

"Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent per annum, upon conditions and subject to the restrictions hereinafter set forth."

As to the exact procedure necessary for the securing of loans from the county or township school funds, your attention

is next invited to Section 10384, R. S. Missouri, 1939, which reads as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts for which he is liable and property exempt from execution. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

The further intention of the legislature on this question may be found in a portion of Section 10385, R. S. Missouri, 1939, which reads as follows:

" * * * In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

Turning now to the Constitution of the State of Missouri, we note that there is a provision prohibiting the use or payment of the county school fund money for any other purpose whatsoever except for the maintenance of free public schools and the State University. We refer to Article XI, Section 6, of the Constitution of Missouri, which reads as follows:

"The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund;

the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

With respect to the members of the county court, we have examined the statutes and find that they must perform the duties imposed upon them, even though no provision is made for the payment of expenses in performing any special duties. It has been held that the members of the county court are not entitled to any fee or fees or expense money incurred in the inspection of any land or lands offered as security for school loans. We find this interpretation in the case of Smith, Judge v. Pettis County, 136 S. W. (2d) 282, 1. c. 285, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * *"

From a further examination of the decisions, we find that officers must perform their duties within the strict limits of their legal authority. We refer particularly to the case of Lamar Township v. City of Lamar, 261 Mo. 171, 1. c. 189, where the court said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are

absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority." (Underscoring ours.)

Also, in the case of Saline County v. Thorp, 88 S. W. (2d) 183, 1. c. 186, the court, in holding that public officers act as special trustees, with very limited authority, in relation to funds held in trust for the public for school purposes, said:

" * * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of these limitations.

April 5, 1943

Montgomery County v. Auchley, 103 Mo.
492, 15 S. W. 626." (Underscoring ours.)

II.

Turning now to the duties of the prosecuting attorney, we find these duties well set out in Section 12944, R. S. Missouri, 1939, which reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: * * *"

Turning to Section 12939, R. S. Missouri, 1939, we find a provision for the amount of salary to be paid the prosecuting attorney, the amount of salary derived from this office being dependent upon the population of his particular county.

With respect to the duties of the prosecuting attorney concerning the fees that accrue in his office, your attention is invited to Section 12941, R. S. Missouri, 1939, and we quote that portion of this statute bearing on the question at hand:

"It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the

April 5, 1943

end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, * * * * *."

It would seem from the above and foregoing that the duties of the prosecuting attorney require him to represent the county in all legal matters, giving his opinion, without fee, regarding the law in all matters in which the county is interested. The requirements imposed upon the county court respecting loans from school funds are quite clear, and it is evident that no loan should ever be made until the abstract of title has been submitted to the county court and the opinion and certification of the prosecuting attorney first had and obtained that the title to the real estate involved in each particular loan is clear and free from all liens and encumbrances, and that the applicant for the loan has a good and marketable title.

Getting to the question involved in your letter, as to whether the applicant for this loan should pay the prosecuting attorney, as such, any fee for the examination of the abstract of title, we wish to point out a rule of the Supreme Court of this state (Rule 55, subdivision 6, of the Supreme Court Rules), the full text of which is as follows:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge

his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed."

It would seem that in order for a person to represent an applicant for a loan under the school fund mortgage provisions of our statutes, he must be under no obligation and certainly not under the direction of the county court. The prosecuting attorney is the legal representative of the county court at such times and under such conditions as it may require. His duties under his oath of office require him to act for the county court alone. If this same officer should attempt in the same instance, and at the same time, to represent the applicant for the loan, he is in the position of an officer holding two offices which are incompatible, and which is prohibited under the statute. Should litigation arise regarding the title to the property upon which the loan is made, or should any suit be instituted wherein the county was an interested party, certainly the duties of the office would require the prosecuting attorney to defend the same to the exclusion of all others.

We find then, in the instance the prosecuting attorney attempts to collect a fee from the applicant for the loan, and at the same time to collect a salary from the state as an officer, his position has been quite well defined in the case of *State ex rel. McAllister v. Dunn*, 277 Mo. 38, 1. c. 44, where the court said:

"It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices the duties of which are incompatible. What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money? If one person could be both collector and treasurer, he would pay over the money as collector and receive it as treasurer, and, as treasurer, issue a receipt to himself, as collector. Under

April 5, 1943

the general law it is settled no man
could have held these two positions.
* * * * *

Also, bearing on this same question, see the case of
State ex rel. v. Brown, 146 Mo. 401, 1. c. 406, where the court
said:

"It is well settled that no officer is
entitled to fees of any kind unless pro-
vided for by statute, and being solely
of statutory right, statutes allowing
the same must be strictly construed."

CONCLUSION

The conclusion at which we have arrived is as follows:

1. There is no provision in our statutes which would
allow the prosecuting attorney to charge an applicant for a
school fund mortgage loan a fee for the examination of an ab-
stract of title.

2. That no interpretation of our statutes by our courts
would allow such a charge to be made; that such a charge would
be incompatible with the official duties of the prosecuting at-
torney, and by no manner or means could it be sustained under
any expression of any court or the legislature.

We further conclude that any statute defining the duties
of an officer will be strictly construed against the officer in-
volved, and any violation, of course, will lead to the penalties
provided in such situations.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

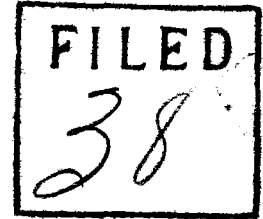
APPROVED:

ROY MCKITTRICK
Attorney General

LIM:HR

BOARD OF OPTOMETRY: Not authorized under certain conditions to
POWERS: subpoena optometrist who makes slanderous
remarks.

June 7, 1943



Missouri State Board of Optometry
C/O Dr. N. R. Hatfield
Secretary-Treasurer
Edina, Missouri

Gentlemen:

This will acknowledge receipt of your request, for
an official opinion under date of May 27, which reads:

"It has come to the official attention
of the State Board of Optometry that
a certain optometrist in the state has
made charges that a member of our Board
is giving out diplomas to men who did
not attend school'.

Since such an accusation impugns the of-
ficial conduct of a Board member directly
and that of the entire Board indirectly,
the Board desires to subpoena the man be-
fore us and to have him present his evi-
dence. We have been advised that the
Board can do this pursuant to Section
10110 of the Revised Statutes of Missouri
1939, which gives the Board power 'to take
testimony in all matters relating to its
powers and duties'.

"Please let us have your opinion as to
whether we have the legal power to do so."

It is a well established principle of law that any
Board, Bureau or Commission being a creature of statute
shall have only such powers as may be conferred upon said
Board, Bureau or Commission by statute. In Aetna Insurance
Company vs. O'Malley, 124 S. W. (2d) 1164, 1. c. 1166 the
court said:

"* * * * * 59 C. J., section 285, page 172, section 286. In the last citation the author says: 'Public officers have an can exercise only such powers as are conferred on them by law, * * * * *'."

It is true that you may subpoena witnesses, books, papers, etc., and take testimony in all matters relating to powers and duties of the Board, but for no other purposes. Section 10110, R. S. Missouri 1939, reads in part:

"* * * * * The said board shall prescribe the duties of its officers and adopt rules and regulations, not inconsistent with this chapter, to govern its proceedings; and also shall adopt a seal; and the secretary shall have the care and custody thereof, and he shall keep the record of all the proceedings of said board, which shall be open at all times to public scrutiny. All certificates issued by the state board of optometry shall be signed by the president and attested by the secretary with the seal of said board attached to or impressed thereon. Every such certificate shall be prima facie evidence of the right of the holder to practice optometry. The president and secretary shall have the power to administer oaths and the board to take testimony in all matters relating to its powers and duties, and for that purpose shall be able to compel the attendance of witnesses and the production of all necessary books, papers, or documents, upon the proper service of a subpoena in proper form, duly attested. * * * * *"

Regardless of whatever this member of your profession may have said relative to one member of your Board giving out diplomas to persons who did not attend school, it does not in any manner of imagination have any direct or indirect bearing upon the action of the Board to issue licenses and suspend or revoke said licenses under such statutory authority vested in said Board. Neither is this a statutory ground for the Board's revoking or suspending a license.

Section 10121, R. S. Missouri 1939, prescribes on what

grounds the Board may refuse to issue, renew, suspend or revoke licenses, and no such reason as complained of in your letter is included therein.

"The state board of optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one or any combination, of the following causes:

"(a) Conviction of a felony, as shown by a certified copy of the record of the court of conviction.

"(b) The obtaining of or an attempt to obtain, a certificate of registration, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentation.

"(c) Gross malpractice.

"(d) Continued practice by a person knowingly having an infectious or contagious disease.

"(e) Advertising by means of knowingly false or deceptive statements.

"(f) Advertising, practicing or attempting to practice under a name other than one's own.

"(g) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine or other habit-forming drugs. The state board of optometry may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke, any certificate of registration, however, for any of these causes, unless the person accused has been given at least 20 days' notice in writing of the charge against him and a public hearing by the state board of optometry. Upon the hearing of any such proceeding, the state board of optometry may administer oaths, and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers. Any circuit court or any judge of a circuit court,

June 7, 1943

either in term time or in vacation, upon application either of the accused or of the state board of optometry may, by order duly entered, require the attendance of witnesses and the production of relevant books and papers before the state board of optometry in any hearing relating to the refusal, suspension or revocation of certificate of registration. Upon refusal of neglect to obey the order of the court or judge, the court or judge may compel, by proceedings for contempt of court, obedience of its or his order."

This member may have an action for slander against this party for what he said against said member. However, this is a personal matter between the member of the Board and the person accused of the slander. Such an action, even if supported by substantial evidence, is often difficult to maintain.

Therefore, it is the opinion of this Department that, under the facts contained in your request, the Missouri State Board of Optometry is not authorized to subpoena this optometrist who is accused of making such remarks against a member of said Board, and thereby have him testify, since such evidence would not afford the Board any grounds for refusing, suspending or revoking his license to practice the profession of optometry.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY MCKITTERICK
Attorney General of Missouri

ARR:EAW

EMBALMING BOARD: Licensing nonresidents.

July 1- 1943



Mr. Allen V. Hays, Secretary
The State Board of Embalming
300 W. Cherry Street
Nevada, Missouri

Dear Mr. Hays:

We acknowledge receipt of your letter of June 15, requesting an opinion, which letter is as follows:

"At the May meeting of the Missouri State Board of Embalming the Secretary was instructed to request of the Attorney General an opinion as to whether or not the Embalming Board could enter into an arrangement or agreement with embalming boards of adjoining states with reference to the acceptance of applications of embalmers duly licensed in said state, to take the examinations for embalmers license in Missouri, provided that the educational and other requirements in said states are equivalent to the requirements in Missouri.

"Thanking you on behalf of the Embalming Board for such an opinion at your earliest convenience, I am * * *

Section 10103, R. S. Mo. 1939, setting out the qualifications of applicants for embalmers' licenses, is as follows:

"From and after the first day of September, eighteen hundred and ninety-five, every person now engaged or desiring to engage in the practice of embalming dead human bodies within the state of Missouri shall make a written application to the state board of embalming for a license, accompanying the same with the license fee of ten dollars, whereupon the applicant, as aforesaid, shall present himself or herself before said board, at a time and place

to be fixed by said board; and if the board shall find, upon due examination that the applicant is of good moral character, possessed of a knowledge of the venous and arterial system, the location of heart, lungs, stomach, bladder, womb and other organs in the human body; the location of abdominal, pleural and thoracic cavities; the location of the carotid, brachial, radial, ulnar, femoral and tibial arteries; a knowledge of the science of embalming and the care and disposition of the dead, and has a reasonable knowledge of sanitation and the disinfection of bodies of deceased persons, and the apartment, clothing and bedding, in case of death from infectious or contagious disease, the board shall issue to said applicant a license to practice said science of embalming and the care and disposition of the dead, and shall register such applicant as a duly licensed embalmer: Provided, that before any license is issued to the applicant, it must appear that he has personally embalmed at least ten dead human bodies, under the direction of a legally licensed embalmer. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving a license under the provisions of this chapter shall have said license registered in the probate judge's office of the county in the jurisdiction of which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such person so licensed."

Rule 6, Section 1 of the Standard of Proficiency provides for the admission to practice in Missouri of embalmers licensed in other states, and is as follows:

July 1, 1943

"Any embalmer admitted to practice the science and profession of embalming of another state in which the standard of admission is substantially equivalent to the standard of this state, and who can furnish the Missouri State Board of Embalming satisfactory and sufficient evidence complying with the educational requirements and standards governing applicants for Missouri license as set forth in the laws and rules governing the State Board of Embalming, particularly paragraph (d) Rule III; said applicant must also furnish a certificate executed and verified to by the secretary of the State Board of Embalming in the State in which he has been admitted to practice certifying that the applicant holds a valid license in said State, and the date said license was issued. The applicant complying with the foregoing provisions and furnishing said certificate to the State Board of Embalming shall serve as the applicant's apprenticeship in Missouri, providing further that said applicant furnish additional evidence that he or she has been actively engaged in the science and profession of embalming in the state in which said applicant has been licensed for a period of five (5) years and has embalmed at least ten (10) human bodies; that whenever a holder of an embalmer's license of another state fails to comply with the terms and provisions as set forth in this rule, and desires to take the State Board Examination, said applicant must comply with all the provisions as set forth in Rule III."

(Reference to Rule III in the section above quoted is erroneous, which error is due to the fact that in carrying over this particular section from the Standard of Proficiency as it

July 1, 1943

was when adopted, the number of the rule was not changed, and it should now refer to Rule 1, Section 1.) Rule 1, Section 1 of the Standard of Proficiency elaborates on the qualifications required by Section 10103 abovequoted and requires that the applicant must be a bona fide resident of this state, and provides certain educational requirements and fees. It is obvious that Rule 6, Section 1 supercedes Rule 1 with reference to nonresidents. The statutes of this state do not require that the applicant must be a resident of this state.

The question of reciprocity is not involved because your inquiry does not involve a question of allowing one licensed in another state to practice in this state without requiring such person to become licensed in this state. There is no statute providing for reciprocal agreements between the Embalming Board of this state and the Embalming Boards of other state. In the absence of a statute, reciprocal agreements are not authorized, although comity may be recognized between states. A general discussion of comity is found in 50 A. L. R., page 30, as follows:

"In considering the question of comity it should always be borne in mind that the recognition of foreign laws cannot be claimed as a right, but only as a favor or courtesy. It is permitted and accepted by all civilized communities from mutual interest and convenience and a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return. When viewed in this light the exceptions and limitations of the doctrine may be more readily understood. Comity, being voluntary and not obligatory, rests in the discretion of the tribunals of the forum, governed by certain more or less widely recognized rules."

CONCLUSION

It is, therefore, the opinion of this department that reciprocal agreements with other states as to requirements for

July 1, 1943

licenses are not authorized by law, but non-residents may be licensed in this state upon furnishing the information and proofs required in Rule 6, Section 1 of the Standard of Proficiency now in force. Formal and binding agreements are not authorized and probably would be without legal effect. However, there is no law forbidding the Embalming Board of this State to enter into informal agreements with other states, with equal requirements for the licensing of embalmers, to the effect that embalmers residing in such state will be licensed in this state upon complying with Rule 6, and without a formal examination, if such state will give equal recognition and opportunity to embalmers holding the license in this state.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:NH

TAXATION
EXEMPTIONS:

Real estate to be exempt from taxes on account of being used for religious worship or for purposes purely charitable must be used exclusively for religious worship or for purposes purely charitable.

May 4, 1943

5-4



Hon. Lane B. Henderson
Prosecuting Attorney
Shelbina, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"The Me. Church South owns a residence building in Shelbina, Missouri, called the parsonage. The pastor for this circuit owns a residence home of his own in Monroe City, Missouri, and he is living in his own residence. He says, and I think it is true, that the parsonage on the circuit is furnished to the pastor and it is considered a part of the salary that he receives. In this case living in his own residence he rents the parsonage and collects the rent and keeps it as a part of his salary or income. He said that he had to keep the insurance on the property and whatever repairs were made on the building had to come out of the rent he collected.

"The Board of Equalization at the suggestion of the county assessor, placed this property on the assessor's books for taxation purposes. The pastor of the church insists that it is not subject to taxation. The assessor insists that it is subject to taxation because it is not being lived in by the pastor but is rented by him. I have read the opinion in 91 Mo. 671 and I would like to have your opinion on this question for the Board of Equalization."

May 4, 1943

If this property is exempt from taxation, it is by virtue of the provisions of Section 6 of Article 10 of the Constitution of Missouri and Section 10937 R. S. Mo., 1939. Said Section 6 provides in part as follows:

"* * *Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, * * *"

Said Section 10937 R. S. Mo., 1939, contains language similar to the language quoted in Section 6, supra. In construing tax exemption provisions, the rule that such provisions must be given a strick but reasonable construction, is to be applied.

From the facts which you submit, it appears that the building in question is owned by a religious organization, that it is a parsonage, that it is not being lived in by the minister but that it is rented to private parties and the rent proceeds are applied to the salary of the minister.

It will be noted that the Constitution and statute, referred to above, exempts property from taxation, if it is used exclusively for religious worship or for purposes purely charitable.

In the case of Bishop's Residence Company v. Hudson, 91 Mo. 671, the court held exempt from taxation premises kept and maintained as a residence for the use and occupancy of the Bishops of the Me. Church South. This case differs from your question because the Bishop actually occupied and lived in the residence. In your case the building is not occupied by the minister but he receives the rentals, from the building, as a part of his salary.

This set of facts, we think, places this property in the same class as that was in the case of State ex rel. v. Y.M.C.A., 259 Mo. 233. The facts in that case were stated

at l.c. 235:

"Defendant owns two buildings in the city of St. Louis, which are mainly used for the physical education and spiritual and social development of young men and boys. However, some of the rooms on the first floor of said buildings, aggregating about fifteen per cent of the floor space thereof, are rented for stores and other commercial purposes. The rentals received by defendants are used only to promote the religious and educational work of the defendant association. * * *"

In speaking of the tax exemption clause in the Constitution and statutes, heretofore referred to, the court at l.c. 237 said:

"* * * The ruling in the Fitterer case (157 Mo. 51) is a construction of our present Constitution and statute, and holds that a building owned by a Masonic lodge, on account of the charitable designs and practices of such lodge, is exempt from taxation, so long as it is used exclusively for such lodge purposes, but when two of the floors of such building are rented for commercial purposes then the entire building becomes subject to taxation. In deciding that case it was said: 'There is a very material difference between the "use of a building exclusively for purely charitable purposes," and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation.'"

and at l.c. 238, the court further said:

"Appellant's learned counsel cite cases from other jurisdictions where it has been held that only such per cent of a building owned by a religious corporation as is used for commercial purposes shall be subject to taxation, but we cannot bring ourselves to believe that any such intent was in the minds of the framers of our Constitution. Just what was in the minds of the framers of our Constitution, it is not necessary to ascertain. What they have said in regard to tax exemptions is so clear as to carry its own construction.
* * * * *

"However much we may sympathize with the exalted purposes of defendant, the words 'dominant use' or 'principal use' cannot be substituted for the words 'used exclusively' without doing violence to a document which we have sworn to support and uphold."

In speaking of the Y.M.C.A. opinion, supra, our Supreme Court in the case of Y.W.C.A. v. Baumann, 130 S. W. (2d) (1939) 499, 501 said:

"* * * the proof showed that a portion of the Association's building was leased to others for commercial purposes. We denied exemption because the property itself was not used 'exclusively' for educational and religious purposes and further held that it was immaterial that the income from the property was so used.
* * * * "

The facts in that case are quite similar to the facts here. If the minister lives in the building, sought to be exempted from taxation, then it is exempt because it is being used for religious worship or for purposes purely charitable. However, if it is rented and used as residence by persons other than the minister then it is used for commercial purposes and is not exclusively used for religious worship or for

Hon. Lane B. Henderson

-5-

May 4, 1943

purposes purely charitable even though the rentals go for those purposes.

CONCLUSION

Therefore, it is the opinion of this department that since the parsonage is not being occupied by the minister or used for religious worship or for purposes purely charitable, then under the authority, hereinbefore referred to, it would not be exempt from taxation.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB/mh

TAXATION:
DEPUTY COUNTY COLLECTORS:
TAX SALES:

Deputy county collectors in counties under township organization may conduct sales of delinquent lands for taxes.

July 10, 1943

Honorable Charles E. Henry
Presiding Judge of the County Court
of Bates County
Butler, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

"Is it necessary that the County Treasurer and Ex-Officio Collector of the County be present in person to conduct these sales or may they legally be held by a deputy appointed by the County Treasurer?"

The County Treasurers in counties under township organization are appointed under the provisions of Section 13792 R. S. 1939.

Section 13989 R. S. 1939 provides in part as follows:

"The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. * * *"

Sections 11126-11134 R. S. 1939 contain the provisions for the collector to follow in collecting taxes on delinquent

lands. In review of the statutes relating to duties of collectors in the collection of taxes and especially those pertaining to the collection of delinquent taxes, we think that these duties come within the class of ministerial.

In the case of *Burton Machinery Co. v. Ruth*, 194 Appeal 195, l.c. 199, the court quoted from *Bouvier's Law Dictionary* the definition of a ministerial act stated as follows:

"* * * 'A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate or legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being done.' * * *"

On the question of deputy official performing acts of the principal, we find the rule announced in 16 Mo. Appeal 539 in the case of *State ex rel. Hudson v. Miller*. In that case it was claimed that certified copies of the tax bills sued on should not have been admitted in the evidence because they were signed by a deputy. In speaking of this assignment, the court said, l.c. 540:

"* * * * There is nothing in the argument that this language restricts the power of the deputy to the collection of taxes; since the power to collect taxes necessarily includes the power to make out and certify back tax bills, and to do all other acts necessary to the collection of taxes. It was, therefore, competent to show by a certified copy of his commission, which was competent evidence for that purpose, that the person who had certified these tax bills as the collector's deputy, was, in fact, such deputy. * * *"

Also in 6 Mo. 106, 121, it was contended that the registrar of the lands had no right to deputize his authority. The court held, however, that the registrar did have authority to delegate ministerial or clerical duties.

It would seem from these authorities that the ministerial duties of a public officer in this state may be performed by his deputy.

Referring to the statutes relating to treasurers in counties under township organization, we do not find where any authority has been conferred upon such officers to appoint deputies. In the case of *Small v. Field*, 102 Mo. 104, the question of the authority of a deputy clerk to perform certain duties was before the court. At l.c. 118 the court said:

"* * * *And it is also said by the appealing defendants that no provision is anywhere to be found in those statutes for the appointment of a deputy for a territorial district court. But at common law a ministerial officer had authority to appoint a deputy. Com. Dig.--Tit. Officer (D. I.); Am. & Eng. Cyclop. of Law ---Tit. Deputy, 624. Thus, a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. 7 Bac. Ab. --Tit. Offices & Officers, 316 (L).

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317, --Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92. * * * *"

The principle is also announced in Volume 43 American Jurisprudence, page 219 at Section 461:

"As an abstract proposition, statutory authority is not necessary to enable a public official to appoint sufficient deputies to perform the duties of his office, but

the appointment of deputies is frequently governed by statutes and the right to appoint deputies may be restricted or made mandatory. Thus, a statute may expressly require that there be a deputy, and only one deputy, and no appointment should be valid unless approved by designated officers. But when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has authority to appoint whomsoever he pleases.

"The power to appoint a deputy may be presumed. Thus, where an instrument has been acknowledged in another state before a deputy clerk of a court, signing himself as such, and affixing the seal of office, it will be presumed, in support of the certificate, that the clerk had authority to appoint a deputy. A public officer, charged with the performance of official duties, does not necessarily have the power to delegate his authority to a person not authorized by law to act. Yet ministerial officers as a general rule may depute such powers and duties to a third person. But as a general rule, legislative authority is essential to the appointment of a general deputy or a deputy or other assistant to whom to delegate quasi-judicial duties and matters. Thus, such officers as a county clerk or clerk of a county court normally have the right to appoint deputies. * * *"

Also under 463 in said volume of American Jurisprudence, the powers of such deputies are stated as follows:

July 10, 1943

"Deputies are usually invested with all the power and authority of the principal, and this is one of the tests for determining whether persons employed in a public office to perform only clerical duties, which constitute only a part of the officer's official duties, are mere clerks and employees or deputies. Accordingly, that a process is addressed by a legislative body to the sergeant at arms does not prevent its execution by his deputy, where the resolution under which the warrant was issued plainly contemplates that a deputy could be directed to execute it. And a deputy clerk may authenticate instruments for record when his principal is authorized to do so. * * * *"

These authorities indicate that the County Treasurer acting as Ex-Officio Collector in counties under township organization may appoint a deputy even though there is no statutory provision for such deputies, and that such deputies may perform ministerial functions of such office.

CONCLUSION.

From the foregoing, it is the opinion of this Department that the County Treasurer and Ex-Officio Collector of a county under township organization may delegate his ministerial duties of selling delinquent lands for taxes to a deputy, and that such official need not be present in person to conduct such sales.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

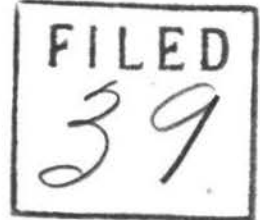
ROY MCKITTRICK
Attorney-General

TWB:PD

MARRIAGE LAW: "Good cause" to be determined in each instance from facts presented.

July 15, 1943

Hon. Cline C. Herren
Judge of the Probate Court
Marshfield, Missouri



Dear Judge Herren:

Under date of June 28, 1943, you wrote this office requesting an opinion as follows:

"In House Bill #20 requiring a three day waiting period before the issuance of a marriage license to an applicant there is a provisions authorizing the Probate Courts to make an order to the Recorder to issue said license without awaiting this period "for good cause shown and by reason of such unusual conditions as to make such marriage advisable."

"The question will come up as to what constitutes 'good cause' and 'unusual conditions' during this period of war and I should like your opinion as to the following matters at your earliest convenience:

"Would the fact that a person is about to be inducted into the army be grounds for such an order?

"Would a soldier home on short furlough be entitled to a waiver of the waiting period?

"I feel sure these questions will arise immediately upon this law going into effect and will appreciate your opinion as to the full intention of this section as undoubtedly the same questions are being studied by all Probate Court in this State."

July 15, 1943

The portion of House Bill #20 enacted by the 62nd General Assembly concerning which you inquire is stated as follows:

" * * * * Provided, however, that said license may be issued on order of the Circuit or probate court or a judge thereof in vacation of the County in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable. * * * *"

The words "good cause" and "unusual conditions" as used in this bill have, of course, not yet been construed by any Missouri court in connection with this bill. However, the words "good cause" have been construed and defined in numerous cases as used in other statutes. In the case of Buckner v. Quick Seal, 118 S. W. (2d) 100, the Kansas City Court of Appeals held that a latent injury not discovered until after 30 days had elapsed was "good cause" for failing to notify the employer of an injury as required by Section 3336 R. S. Mo. 1929 (now Section 3726 R. S. Mo. 1939).

The case of State v. Johnson, 318 Mo. 596 holds that "good and sufficient cause" was shown by appellant in a criminal case for an extension of time within which to complete an appeal, by a showing that the attorney for appellant had failed to properly perform his duties. This ruling was given in Section 3761 R. S. 1929 (now Section 4151 R. S. 1939).

And again, in discussing the same language, the Supreme Court in the case of State v. Thomas, 318 Mo. 843 held that a showing that the filing of the transcript in the Supreme Court was delayed due to post office rules and a Sunday and holiday coming together was "good and sufficient cause" for permitting an appeal to be perfected out of time.

In the very early case of Green v. Goodloe, 7 Mo. 25, it was held that the good cause which would authorize a court to set aside a default judgment must include meritorious defense and showing of all diligence.

July 15, 1943

Further in this connection, the following quotation from the Alabama case of Ex parte Canada Life Assurance Co. Choate v. Canada Life Assurance Co., 115 Southern 244, 245 is cited:

"* * * * * The authorities are not very numerous in defining "good cause", as these words seem to have no fixed meaning, but must depend upon the circumstances of each case determined largely by the sound discretion of the court. Christensen v. Anderson, 24 Tex. Civ. App. 345, 58 S. W. 962. There are a few cases somewhat analogous to the one in hand. In the case of Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867, it was held that, when a statute gave the right of appeal from a justice within 10 days from the entry of the judgment or thereafter, and, within 90 days upon showing good cause for not having taken the appeal within the 10 days, the fact that the defendant was a nonresident, and did not know that the appeal was required to be taken within 10 days, is not good cause for granting an appeal. The words "good cause" in the statute authorizing appeals after the prescribed time upon showing good cause mean a showing that appellant was prevented from taking his appeal within the time by fraud, surprise, or adventitious circumstances beyond his control as would entitle him to a new trial. Home Machine Co. v. Floding, 27 W. Va. 540. * * * * *

From the foregoing, it is the opinion of the writer that the "good cause" referred to in House Bill #20 enacted by the 62nd General Assembly would necessarily be a matter to be determined within the discretion of the court or the judge of the court in each instance; that no hard and fast rule could be laid down as to what would constitute "good cause"; that there should be a showing to the court or the judge thereof of the facts relied upon; and that the finding of the court should be based upon valid and substantial reasons for waiving the issuance of the three day waiting period, taking into consideration the intention of the Legislature in enacting the bill; and that the finding of "good

July 15, 1943

cause" could not be based upon whim, caprice or an unreasonable and arbitrary desire on the part of the applicants to avoid the three day waiting period.

We do not find that the words "unusual conditions" have been defined by any court. "Unusual" is defined in Webster's New International Dictionary, Second Edition, as "not usual, uncommon, rare".

The intention of the Legislature in enacting House Bill 20 was to provide a period of waiting between the application for a license to marry and the issuance of the license in order to prevent hasty and ill considered marriages which would probably not be of a lasting nature.

CONCLUSION.

Taking into consideration the intention of the Legislature in enacting House Bill #20, and the foregoing definitions, it is the opinion of the writer that the "good cause" and "unusual conditions" which would authorize the court or judge to direct the issuance of a marriage license without the three day waiting period are matters which must be determined by the judge of the court, within his said discretion, taking into consideration the character of the applicants, the circumstances surrounding the application and the facts relied upon by the applicants.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

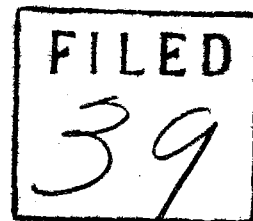
APPROVED:

ROY MCKITTRICK
Attorney General

WOJ:PD

SCHOOLS: School district receiving State aid may pay excess above \$3.00 allowed for transportation costs, out of incidental funds of the district.

August 17, 1943



Representative J. B. Meriford
Hammond, Missouri

Dear Mr. Meriford:

This will acknowledge your personal request for an opinion on the following questions:

1. Whether school boards and faculties can charge an additional fee above the \$3.00 State Aid for pupils riding school buses.
2. Has the school board a right to refuse transportation for any child who cannot pay the fee required in excess of State aid.

Free transportation of school children is a practice recognized for a considerable period of years. The obvious purpose of the law relating to this subject is to offer an opportunity to every child in the state to attend school. In the past some confusion has existed as to the intent of the Legislature on this question. While some obscurity has existed in the past, we believe that the School Law of 1931, as enacted by the Legislature, together with the interpretations given since that date, disclose that the Legislature clearly intended to provide transportation for pupils in districts having no schools or inadequate facilities for schools and requiring attendance in other districts.

Section 10526, R. S. Mo. 1939, provides for the free transportation of pupils and the full text of this section reads as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the school-house, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in Section 10361. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district: Provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

August 17, 1943

It would seem that the State aid afforded in the matter of transportation costs shall not exceed the sum of \$3.00 per month per pupil, but it does not mean that this is a limit set by the State as to the amount which may be paid for the transportation of each pupil. The State aid is offered with the intent of solving a portion of the transportation problem within each school district, and the General Assembly did not mean that the sum of \$3.00 was the maximum which might be paid for the transporting of a pupil to other schools.

Under Section 10326, R. S. No. 1939, quoted above, a proper method whereby money may be raised to pay for the transportation of pupils, which sum of money is to augment that money received from the State under authority of Section 10327, R. S. No. 1939, if any extra money is needed.

We cannot find any portion of the statute which concerns itself with State aid for transportation, requiring the pupils as individuals, or their parents, to supply the difference between the \$3.00 State aid and the amount necessary for the transportation of the pupil. It would seem that the obvious intention of the Legislature is to give the school a right to send pupils to another district, and a further right to make up the difference in transportation costs between the State aid allowed and the actual cost of transportation.

CONCLUSION

It is, therefore, the opinion of this department that a school district which provides transportation facilities for its pupils to another district, for which said district receives \$3.00 as reimbursement for State aid, may pay the amount in excess of \$3.00 out of the incidental funds of the district. It is also the opinion of this department that such excess funds are not due from the individual pupils, nor their parents, within said district.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:CP

LIQUOR) When supervisor may revoke license after cancellation
BONDS) of bond.

September 27, 1943

1075



Hon. W. G. Henderson
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Henderson:

This will acknowledge receipt of your request for an opinion under date of September 24, 1943, which reads:

"I respectfully request your opinion on two matters which have arisen in this department.

"For a number of years the bond required under Sections 4890 and 4896 R. S. Missouri, 1939 have contained this provision:

" 'This bond is given and received under the express conditions that if the Surety shall so elect, this bond may be terminated by giving thirty (30) days' notice in writing to Principal named herein and to the Supervisor of Liquor Control of Missouri.' "

"In an instance where the licensee is given such notice and fails to possess a new bond there are two questions involved:

"First, Is it possible for me to treat the license as void and deny all privileges on the date of cancellation, or is it necessary that I issue a citation and revoke the license under a citation proceeding.

"Second, Since it requires a ten day notice of a citation hearing would the bonding company be liable for any action on the bond, the basis of which occurred during the 10 days required to cite the licensee."

46 C. J., Section 290, Page 1033 states the general and fundamental rule that a public officer can exercise only such authority as granted by the Statute and Constitution and reads in part:

"Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any manner or under different circumstances is a nullity. * * *"

One of the cardinal rules of Statutory Construction is to ascertain the lawmakers intent from words used and give effect to same. In Wallace v. Woods, 102 S.W. (2d) 91, l. c. 95, the court said:

" 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration. * * * ' "

Section 4905, R. S. Mo. 1939, prescribes the procedure for a suspension or revocation of a liquor license and reads:

"Whenever it shall be shown, or whenever the supervisor of liquor control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said supervisor of liquor control shall suspend or revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to suspend or revoke his license prior to the order of revocation or suspension issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing the grounds upon which his license is sought to be revoked or suspended."

Section 4896, R. S. Mo. 1939, provides as a prerequisite to obtaining a license to sell intoxicating liquor that the licensee furnish a bond and reads:

"Application for license to manufacture or sell intoxicating liquor, under the provisions

of this act, shall be made to the supervisor of liquor control. Before any application for license shall be approved the supervisor of liquor control shall require of the applicant a bond, to be given to the state, in the sum of two thousand dollars, with sufficient surety, such bond to be approved by the supervisor of liquor control, conditioned that the person obtaining such license shall keep at all times an orderly house, and that he will not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any of the provisions of this act and that he will pay all taxes, inspection and license fees provided for herein, together with all fines penalties and forfeitures which may be adjudged against him under the provisions of this act."

Also Section 4890, R. S. Mo. 1939, requires a licensee to furnish a bond and reads in part:

"* * * In each instance, a bond in the sum of two thousand (\$2,000.00) dollars, with sufficient surety, to be approved by the supervisor of liquor control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder: Provided, that no person financially interested in the sale of intoxicating liquor at wholesale shall be accepted as surety on any such bond."

Section 51, Page 428, 11 C.J.S., in part reads:

"General and indefinite words in the bond will be controlled by a recital specifying the time in which a condition is to be performed, and whether the liability is a continuing one, although the time will not be extended by an implied condition beyond that which it was evidently intended by the terms of the obligation to cover. If the bond on its face refers exclusively to the time of execution, then that time governs the acts and subject matter; * * *"

September 27, 1943

Since the licensee has furnished a bond approved by the supervisor of the Department of Liquor Control with a provision allowing cancellation within thirty (30) days after notice, it is the opinion of this Department that said licensee has fully complied with the Statutes and since the supervisor has only such power as granted by law he is unauthorized to suspend or revoke any license except as hereinabove provided under Section 4905, supra, which requires the giving of a ten (10) days' notice to the licensee. Such licensee has violated no provision of the laws regulating the sale of intoxicating liquor until said bond may be cancelled and said licensee fails to secure another bond. No citation or notice to appear and show cause why said license should not be revoked may issue, until such time when said licensee fails to furnish a bond then the supervisor may cite said licensee for failure to have furnished a bond.

We might suggest that you as supervisor as soon as you are notified of a cancellation of said bond, notify the licensee to secure a bond on or before time for the expiration of the present bond or you will be required to revoke said license. However, such revocation can only happen after notice and hearing to said licensee.

Conclusion

Therefore, in conclusion it is the opinion of this Department that the Supervisor of the Department of Liquor Control may only revoke any license after giving ten (10) days' notice and a hearing as provided in Section 4905 supra, that in case of cancellation of a bond after giving of notice as provided in said bond and failure of said licensee to secure another bond by the time the present bond is cancelled, the Supervisor may cite said licensee to appear within ten (10) days thereafter and show cause why his license should not be revoked, but only after the expiration of the present bond.

Respectfully submitted,

Aubrey R. Hammett, Jr.
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

ARH:ir

INTOXICATING LIQUOR
ELECTION

Construing Section 4890, RSMo 1939

September 29, 1943



Honorable W. G. Henderson
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Henderson:

This will acknowledge receipt of your request for an official opinion, under date of September 10, 1943, which reads:

"I respectfully request your opinion as to my duties under Section 4890, R. S. Mo. 1939.

"It is my understanding that, in determining whether or not a city has a population of 20,000 inhabitants, for the purpose of issuing a license for the retail sale of intoxicating liquor by the drink, I must look to the last census of the United States.

"The questions arise where towns claim a population of more than 500 since the last census.

"First, can a town that did not have a population of 500 at the last census decide that it has reached that figure and recognize a petition for an election.

"Second, if a town that did not have a population of 500, as shown by the last census, holds an election and certifies the result as required by law, is it my duty as supervisor of liquor control to recognize such certificate and issue licenses, or is it obligatory on me to refuse to issue."

One of the primary rules of Statutory Construction is to ascertain and give effect to lawmakers intent.

In Artophone Corporation v. Coale, 133 S.W. (2d) 343, 1.c. 347, 345 Mo. 344, the court said:

"Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, * * *'"

Section 4890, R. S. Mo. 1939 reads:

"Any person who possesses the qualifications required by this act, and who meets the requirements of and complies with the provisions of this act, and the ordinances, rules and regulations of the incorporated city in which such licensee proposes to operate his business, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this act defined, by the drink at retail for consumption on the premises described in the application: Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand (20,000) inhabitants, under the provisions and methods set out in this act. The population of said cities to be determined by the last census of the United States completed before the holding of said election: Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred (500) inhabitants or more: Provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent

by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities. In each instance, a bond in the sum of two thousand (\$2,000.00) dollars, with sufficient surety, to be approved by the supervisor of liquor control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this act, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder: Provided, that no person financially interested in the sale of intoxicating liquor at wholesale shall be accepted as surety on any such bond."

The above statutory provision specifically provides, that for the purpose of this act the term 'city' shall be construed to mean any municipal corporation having a population of 500 inhabitants and further that the population of said cities is to be determined by the last census of the United States taken before the holding of said election. All of which clearly indicates to the writer that no city may entertain a petition for an election that did not have a population of at least 500 as shown by the last census of the United States immediately preceding said election, and if such an election is held in a city not having 500 inhabitants according to the last United States census, then under the foregoing statutory provision you as Supervisor of the Department of Liquor Control for the State of Missouri, are not authorized to issue any liquor permits to applicants residing in said city, since the Office of Supervisor of the Department of Liquor Control is created by Statute and such officer is vested only with such powers as are expressly contained in the Statute.

In State v. Wymore, 132 S.W. (2d) 1.c. 988, the court said:

"Necessary implications and intendments from the language employed in a statute may be resorted to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a

power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication.'"

CONCLUSION

Therefore, it is the opinion of this Department that no election may be held in any city under Section 4890 supra, when the last United States Census immediately preceeding said election shows there were less than 500 inhabitants residing in said city, and futhermore you as Supervisor of the Department of Liquor Control are unauthorized to issue any liquor license to any applicant residing in said city.

Respectfully submitted,

Aubrey R. Hammett, Jr.
Assistant Attorney General

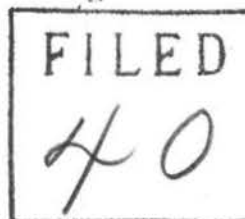
APPROVED:

ROY McKITTRICK
Attorney General

COUNTY COURT: Old county court may employ janitors whose terms extend into term of new county court; two members of the county court may make an order to transact business without the presence of the other member of the county court.

January 14, 1943

Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri



Dear Sir:

Your request of January 6, 1943, for an opinion on two matters pertaining to the action of the county court of Ray County, has been received.

This request consists mainly of two question, the first question reading as follows:

I

"The County Court of this County is composed of three members - a Judge from the Western District, a Judge from the Eastern District, and a Presiding Judge, who is elected from the County at large. All three members were sworn into office the 2nd day of January, 1943. The old Court made certain appointments and orders of record relative to hiring janitors for the Court House, and fixing their salaries, and then finally adjourned their November term upon December 31st.

"The question now arises as to whether or not the New Court may set aside the orders and break contracts made by the Old Court and substitute new and different agreements in their place?"

Honorable Wilson D. Hill

-2- January 14, 1943

Section 36, Article VI of the Constitution of the State of Missouri, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By reason of this section of the Constitution, the legislature enacted Section 2480 R. S. Missouri, 1939, which reads as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In the first question of your request, you stated that the old county court appointed janitors for the courthouse, fixing their salaries and then adjourned their November Term upon December 31st. I am presuming that the old county court entered into some contract, with the janitors, which would extend over into the term of the new county court which was sworn in on January 2, 1943:

January 14, 1943

In a recent case handed down by the Supreme Court of this State, it was held that the county court could appoint janitors, and set their salary, for a term that might hold over under the next new county court.

It was so held in the case of Aslin v. Stoddard County, 106 S. W. (2d) 472, 1. c. 475, where the court said:

"By section 2078, R. S. 1929, Mo. St. Ann. Sec. 2078, p. 2658, it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate the express power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body. See, on this question, Manley v. Scott, 108 Minn. 142, 121 N. W. 628, 630, 29 L. R. A. (N. S.) 652, and notes in latter volume.

"No case from this state is cited nor have we found any directly adjudicating the precise question

now under consideration, viz., whether the county court may lawfully make a contract, binding upon the county (assuming good faith in the making thereof and reasonableness as to time of performance), the performance of which will extend beyond the terms of office of part or all of the members of the court as then constituted. * * *

The court further said, on page 477 of the same case:

"In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold.

"We take next the contention that the contract was for an unreasonable time and was made in bad faith and collusively. As to the time factor we think it clear that one year cannot be considered an unreasonable term of employment, the circumstances considered. The county court needed the services of a competent janitor (a continuing need), and, being agent of the county and trustee of its funds (Kansas City Disinfecting & Mfg. Co. v. Bates County, 273 Mo. 300, 201 S. W. 92), owed the county the duty to conserve its funds and to procure necessary labor and service at the best available price. It may well be that, in the judgment of the court, a competent janitor, who

might, perhaps, have found employment elsewhere, could be hired at the time in question for the definite term of one year, to the advantage of the county. The result in the instant case emphasizes that thought. There is no contention that plaintiff was not competent and suitable for the work for which he was employed. Prior to his employment Parks had been receiving \$60 per month for doing the same work which plaintiff contracted and was willing to do for one year at \$50 per month. The 'new' county court (so called in appellant's brief) continued to pay Parks \$60 per month. The contract with plaintiff, if carried out, would have saved the county \$10 a month for a year -- a substantial saving on an item of the size involved.

"Neither do we think the agreed facts would justify us in holding, as matter of law, that the court acted fraudulently or in bad faith in employing plaintiff. Fraud is not presumed. Contra, right rather than wrong action is presumed, if presumption may be indulged. So far as concerns the employment of plaintiff alone, that contract certainly cannot be said to indicate bad faith or wrongful purpose on the part of the court. As we have pointed out, it was calculated to conserve the county's funds -- to save money for the county, and would have so resulted had it been adhered to. But it is said that, at the same time, when two members of the court

were about to bid farewell to their official positions, the court made three other 'appointments,' each for a term of one year, when the statute did not fix any definite term for such appointments or employments. One of those 'appointments,' that of Mooney, seems to have been considered by the so-called 'new court' as all right, since he was retained (though for an indefinite term). As to none of them is there any showing concerning salaries, or the reasons why the county court made the alleged 'appointments' on December 31, 1932. We have but the bare fact that the appointments were made. From this it is argued that said appointments were made collusively and in bad faith, for the purpose of forestalling the court, after the two newly elected members took office, from appointing other persons to such positions, and that, inferentially, it must follow that plaintiff's employment was actuated by the same purpose. We cannot say, as matter of law, that it conclusively so appears. The trial court found the issues for the plaintiff. We would not be justified in setting aside that finding."

Under the holding in the above case, the old county court could employ janitors for a term that may not be terminated until some time during the term of the new county court, providing the term and salary are reasonable.

CONCLUSION

It is therefore the opinion of this department that the members of the county court of Ray County, whose terms expired December 31st, 1942, could have employed janitors for the courthouse and fixed their salaries, even though the term of employment was carried over into the term of the new county court, if such employment, salary and term were reasonable.

The second question contained in your letter, reads as follows:

II

"Can a County Court during the regular term, when it has recessed for a period of five days, be reconvened sooner than that by action of only two of the members without giving notice to the Presiding Judge?"

"If the Presiding Judge does not think it necessary for the Court to meet oftener than once a week, can the other two judges transact and make business without his consent and presence?"

Section 2485 R. S. Missouri, 1939, partially reads as follows:

"Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient: * * * * *

The above term is what is called the "regular" or "stated" term, and can only be changed by giving a notice as to different dates, in such a manner as to them shall seem expedient.

Section 2487 R. S. Missouri, 1939, reads as follows:

"The president or any two judges of the county court may order a special term whenever the business and interest of the county may require it."

This is known as a special term and notice must be given as set out in Section 2488 R. S. Missouri, 1939, which reads as follows:

"Notice of such special term shall be given to the judges who were absent when the same was ordered, and by advertisement placed up in five public places in the county at least five days before the commencement of such term."

The next term set out by the legislature is one that is known as an "adjourned" term, as set out in Section 2489 R. S. Missouri, 1939, which reads as follows:

"Each county court may hold adjourned terms whenever it may become necessary for the transaction of its business."

In other words, there is a regular stated term, as set out in Section 2485, supra, a special term, as set out in Section 2487, supra, and an adjourned term as set out under Section 2489, supra. It has been held that a special term may be held during the time of the regular term, or adjourned term. It was so held in the case of State v. Thompson, 285 S. W. 972, 1. c. 975, where the court said:

"Section 2581 provides for special terms, and section 2583 provides for adjourned terms. The notice which the court ordered served on the property owners affected required them to appear —

"'at the courthouse in the city of Perryville, Mo., on Monday, the 6th day of April, 1925, it being the first day of the next regular term of said court, and show cause why their lands should not be incorporated into said levee district.'

"The record of the county court copied in relator's petition shows that the county court of that county at the May term, 1917, made and entered an order finding:

"That on account of the increase of the volume of business to be transacted by the county court there is not sufficient time to transact all of said business at the regular terms thereof. * * * It is therefore ordered by the court that the county court convene on the first Monday in each month to transact such business as may properly come before it."

"The petition filed here also states that after making that order the county court 'has been convening in regular session' on the first Monday in each month. Respondent argues that this shows an attempt to establish 12 terms a year, and since Perry county contains fewer than 75,000 inhabitants, this could not be done under section 2579. Therefore there was no regular April term, and the order of extension under section 4699 was a nullity.

"Before respondent is in position to attack the order and notice on that ground, it must affirmatively appear that such was not the time of holding the regular term of the county court in that county. The presumption of regularity and legality in the proceedings of that court obtains. Overton v. Johnson, 17 Mo. 442; State ex rel. v. Ellison, 285 Mo. loc. cit. 312, 226 S. W. 559, 12 A. L. R. 1157.

"In the first place, the order on its face does not attempt to create 12 terms a year. It recites that on account of the volume of business there is not sufficient time to transact it all 'at the regular terms' of the court, and therefore it is ordered that they 'convene on the first Monday of each month' to transact such business as may properly come before it. There is nothing to show that those conventions on the first Monday of each month were other than special terms, held after due notice required by section 2582, R. S. 1919."

It was also held that a special term could be held during the regular term, in the case of *State ex rel. v. Mitchell*, 127 Mo. App. 455, 1. c. 461, where the court said:

" * * * In *State v. Riddle*, 179 Mo. 287-299, 78 S. W. 606, our Supreme Court considered a question which arose on a state of facts where a special term of the circuit court had been holden during the recess of a regular term of the same court, and before its final adjournment, precisely as in this case, and no mention was made of the question here pressed upon the court. It was there said that such special terms are entirely independent and are in no manner connected with the regular term of such courts. Indeed, it seems that the salutary provisions of these statutes

authorizing special terms would almost entirely fail were the courts to adjudge that no special terms could be held during the interval or recess while the regular terms may not yet be finally adjourned."

The same holding was had in the case of *The State ex rel. Trammel v. The Hannibal & St. J. Ry. Co.*, 101 Mo. 136, l. c. 150, where the court said:

"These taxes against railroad property are to be levied after the assessments are returned 'at a regular term of said court, if in session at the time; if not at a special term of said court called for that purpose.' Sec. 6879. When the county court opens a stated term and adjourns from day to day or for a number of days, such adjournments are but a part of the regular term, and the tax may be levied at any of these adjourned sessions. The special term mentioned in the clause of the statute just quoted evidently means a term called pursuant to sections 1207-8, Revised Statutes, 1879; but when the court adjourns from time to time, the adjourned terms, as they are called, are but parts of the regular term."

In the second question of your request, you stated that the county court, during the regular term recessed for a period of five days, and then reconvened sooner, and by action of only two of the members, without giving notice to the presiding judge.

Section 2493 R. S. Missouri, 1939, reads as follows:

"A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

Under this section a majority of the judges of the county court shall constitute a quorum. It has been held in this State, that even if the county court does adjourn to a certain date, it may convene at a date sooner than the adjourned date and the session would be lawful. It was so held in the case of Smith v. Supreme Lodge K. of P., 83 Mo. App. 509, 1. c. 512, where the court said:

"It is stated in the return of the respondent that the said county court adjourned on the sixth day of March, 1900, to the twelfth day of said month, and that on the seventh day of said month it met and made said order.

"The only question raised by the pleadings is whether or not the action of the county court when it met in session on the seventh day of March, 1900, and made the order in question was valid. That the said court was lawfully in session when it made said order seems well established in this and other states. Cole Co. v. Dallmeyer, 101 Mo. 66; State ex rel. v. Railway,

101 Mo. 136; Green v. Morse, 77
N. W. Rep. 925; Bowen v. Stewart,
26 N. E. Rep. 168; Wharton v. Sims,
88 Ga. 617; The Canary, 22 Fed. Rep.
536; Eastman v. Concord, 64 N. H.
263."

In the above case the question of whether or not only two judges are present does not appear, but it can be inferred that all three judges were present when the date of the meeting was changed, or advanced to a sooner date.

Under the facts in the second question of your request, you state that the county court, during the regular term, recessed for a period of five days, but reconvened sooner than that by action of only two members, without giving notice to the presiding judge. The recess of five days is merely adjournment, at which time the adjourned term would begin, and since they convened at an earlier date, with only two members present, it would have been necessary to give the notice to the absent judge, as set out in Section 2488, supra.

The calling of a session of the county court, at a time between the adjourned date, and the date to which the adjournment was made constitutes a special term and any act of the two county judges, although a quorum was present, would be invalid.

CONCLUSION

It is, therefore, the opinion of this department, that a county court, during the regular term, when it has recessed for a period of five days, may be recon-

January 14, 1943

vened sooner than that by action of all three members.

It is further the opinion of this department, that when the county court adjourns to a certain date, and then a session is held by only two members, at a date sooner than the date set for the adjourned term, a notice must be given to the absent judge, if one be absent, and by advertisement posted in five public places in the county, at least five days before the commencement of such term.

It is further the opinion of this department, that if the presiding judge does not think it necessary for the court to meet oftener than once a week, the other two judges, who constitute a quorum, can transact business without his consent or presence during any lawful term.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTICK
Attorney General of Missouri

WJB:RW

COUNTY OFFICERS
SURETY BOND:

Consent and approval of County Court for
surety bond should be secured in advance.

April 7, 1943

H-21



Hon. Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Hibbard:

The Attorney General wishes to acknowledge receipt of your letter of April 1, 1943, requesting an opinion from this office as follows:

"Will you kindly advise me as to your interpretation of Section 3238 R. S. Mo., 1939, as it applies under the following circumstances:

It has been the custom and practice in Marion County to accept a surety bond from the county treasurer as well as other county officers. However, at no time has the County Court ever advised the County Treasurer or any other officer that they would require a surety bond but have merely insisted that a good and sufficient bond be filed. The County Treasurer through his attorney is now asking the County Court to pay the premium on the County Treasurer's bond which was given and accepted under the circumstances I have just described.

In view of the recent case in the Supreme Court of Missouri, Motley et al vs. Calloway County, 149 S. W. 2nd, 875, will you kindly give me the benefit of your interpretation of this statute as it applies under the facts I have described."

April 7, 1943

Section 3238, R. S. Mo., 1939, referred to in your letter was enacted as House Bill, No. 125, by the 59th General Assembly, and is found in Laws of 1937, at page 190.

The portion of this section, pertinent to your inquiry, is set out in the case of Motley vs. Callaway County was referred to in your letter and is quoted herein:

"Whenever * * * any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer * * * shall be required by law of this State, or by charter, ordinance or resolution, or by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such * * * county * * * to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri, and the cost of every such surety bond shall be paid by the public body protected thereby."

At the same session of the General Assembly, Section 12133 R. S. Mo., 1929, was reenacted as a part of House Bill No. 20, Laws of 1937, page 427, this Section is as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Under the situation described in your letter, it may be argued that the treasurer by furnishing a surety bond has manifested his election to furnish that type of surety, and that the County Court by receiving and approving such bond has complied with the terms of Section 3238, supra.

April 7, 1943

If these were the only statutory provisions relating to the type of surety, which the County Treasurer could furnish, such argument would carry great weight. However, it is desired to call to your attention, Section 5906, R. S. Mo., 1939, which is in part as follows:

"Any company having a paid-up capital of not less than two hundred thousand dollars, organized and incorporated under the laws of this or any other state of the United States, or any foreign government, for the purpose of transacting the business of becoming surety on bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust, and which has complied with all the requirements of the law regulating the admission of such companies to transact business in this state, may, on production of evidence of solvency satisfactory to the court, judge, clerk, head of department or other officer, person or persons authorized to approve the same, become and be accepted as surety on the bond, recognizance or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the state; and if such surety company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional security may be exacted, but other security may, in the discretion of the official authorized to approve such bond or obligation, be required; and such surety company may be released from its liability on the same terms and conditions as are by law prescribed for the release of individuals, it being the true intent and meaning of this article to enable corporations, created for

April 7, 1943

that purpose, to become surety on any bond recognizance or other writing in the nature of a bond, in the same manner that natural persons may, subject to all the rights and liabilities of such persons. * * *
(Underscoring ours)

This section was in existence at the time of the enactment of Section 3238, and the reenactment of Section 12133 R. S. Mo., 1939, which is now Section 13795, R. S. Mo., 1939.

It is apparent that prior to the enactment of Section 3238, the officer had the privilege of furnishing a surety bond at his own expense, if he desired to do so. The Section 3238, supra, therefore, only had the effect of authorizing the county to pay the costs of a surety bond, in the event the officer elected to furnish the bond and the governing agency of the political body protected by the bond, followed the terms of Section 3238.

There have only been two cases involving this section of the statutes before the appellate courts, the case of Motley vs. Callaway County, 149, S. W. (2d) 875, referred to in your letter, and the case of Boatright vs. Saline County, No. 38298 in the Supreme Court not yet officially reported. In neither of these cases is a situation similar to that mentioned in your letter discussed. In the Motley case, supra, the court, in discussing the constitutionality of Section 3238, used the following language at l. c. 877:

"The legislature, no doubt taking notice of the results of some of these during recent depression periods, considered that surety company bonds could give better protection to public funds in the custody of public officers. It, therefore, authorized such a bond for county officers if the officer elected to furnish it and the county court approved it. It also recognized that to require an officer to pay the premiums therefor would have the effect of reducing his actual net compensation. So when consent and approval for

the officer to purchase such a bond at public expense was given in advance by 'the public body protected,' it was required to pay the cost. * * * * The 1937 Act only authorized the county to make an agreement for this type of bond, and, if it did so in advance, to pay for it when it was furnished. * * *" (Underscoring ours)

It may be said of these passages that they are obiter dictum and were not necessary for the purpose of determining the question under discussion, namely, whether the payment of the premium of an officers bond, with public funds, was a public purpose, but the two expressions seem to give a clear indication of the view of the court. And this is especially true of the last sentence above quoted.

At this point it is desired to call attention to a brief quotation from the Boatright case, supra.

"It is apparent the Legislature intended the county to be liable only in case the County Court consented thereto and approved the giving of such bond. County Courts are courts of record and can speak only by and through the records."

Under the situation described in your letter, there is no mention of any record having been made by the court, consenting to the giving of the surety bond by the treasurer, and agreeing to pay the premium for such bond.

CONCLUSION

The question is close and there should be a case brought

Hon. Roger Hibbard

-6-

April 7, 1943

at sometime to have this section construed. But until the section is construed on the proposition mentioned in your letter, it is the opinion of the writer that a county officer who desires to have the county pay the premium for a surety bond, should follow what is said in the Motley case and get the consent and approval of the county court in advance to the giving of such surety bond.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

COUNTY COURTS: County courts may appropriate funds for purchase
AIRPORTS: and maintenance of airport in the county.

April 20, 1943



Honorable Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an official opinion, which request reads:

"The County Court of Marion County
has requested the opinion of this
office as to the right and power of
the County Court to appropriate
county funds for the purchase of land
within the county to use as an air-
port. No doubt your office has made
a former ruling upon this matter which
we do not have in file. If not, will
you please give me the benefit of the
opinion of your office in this con-
nection."

We regret to advise that this Department has never
ruled upon this matter. The Supreme Court has repeatedly
held that county courts are courts of limited jurisdiction
and have only such authority as is conferred by statute.
In *J. H. Bayless et al. v. Justus Gibbs et al.*, 251 Mis-
souri 492, 1. c. 506, so often referred to we find the fol-
lowing:

"This court, in numerous cases, has
repeatedly held that the county courts
of the respective counties of the State

are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

Therefore, we must examine the statute to determine the extent of such authority of the county court to expend funds for such purpose.

Section 15123, R. S. Missouri 1939, authorizes the county court of any county after a hearing to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields.

"The county court of any county in this state is hereby authorized after a hearing to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft within the limits of such counties, and may use for such purpose or purposes any property suitable therefor, that is now or may at any time hereafter be owned or controlled by such county."

Section 15124, R. S. Missouri 1939, further provides that counties shall have the right to acquire property for such purposes under the power of eminent domain.

"Any lands acquired, owned, controlled or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 15122 and 15123 hereof shall and are hereby declared

to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public necessity, and such cities, villages, towns, or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity."

Section 15125, R. S. Missouri 1939, provides that the purchase of such land or airport may be wholly or partly from the proceeds of the sale of bonds subject, however, to the adoption of a proposition at an election.

"Private property needed by a city, including cities under special charter, village, town, or county for an airport or landing field shall be acquired by purchase if such city, village, town or county is able to agree with the owners on the terms thereof and otherwise by condemnation, in the manner provided by the law under which such city, village, town or county is authorized to acquire real property for public purposes, other than street purposes, or, if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price or award for real property acquired for an airport or landing field may be paid for wholly or partly from the proceeds of the sale of bonds of such city, village, town, or county, as the local legislative body of such city, village, town or county shall determine, subject, however, to the adoption of a proposition therefor at an election to be held in such city, town, village or county for such purpose."

Section 15127, R. S. Missouri 1939, further authorizes the county court to appropriate annually funds to carry out the purpose of this article.

"The local authorities of a city, includ-

ing cities under special charter, village, town or county to which this article is applicable having power to appropriate money therein may annually appropriate a sum sufficient to carry out the provisions of this article."

In *Dysart v. City of St. Louis et al*, 11 S. W. (2) 1045, 1. c. 1048-1049, the Supreme Court held that the acquisition, improvement and development of land for an airport with the necessary landing field, buildings, runways, etc., by the city constitutes public purpose as provided in Section 3, Article X of the Constitution of the State of Missouri.

"The question of whether the acquisition and control of a municipal airport is a public purpose within the purview of the constitutional principle heretofore adverted to is obviously a new one. The courts which have had occasion to consider it have, however, answered in the affirmative. *City of Wichita v. Clapp*, supra; *State ex rel City of Lincoln v. Johnson*, State Auditor (Neb. 1928) 220 N. W. 273; *State ex rel Hile v. City of Cleveland et al.* (Ohio Ct. App. 1927) 160 N. E. 241; and no court of last resort, so far as we are advised, has ever held the contrary. Not only that, but the governmental nature of the function involved is given tacit recognition in numerous recent statutory enactments, both state and federal: Laws of Georgia 1927, p. 779; R. S. Kansas 1923, 3-110; Public Acts Conn., 1925, ch. 249; Laws of Mass. 1922, ch. 534, Sec. 57; Laws of Mont. 1927, ch. 20; General Code of Ohio, par. 15, Sec. 3677; Pa. Act. No. 328 of 1925 (Pa. St. Supp. 1928, Secs. 460C-1 to 460C-3); Act 254 of the 69th Congress (the Federal Air Act (49 USCA Sec. 171 et seq.)). We have no doubt as to the soundness of the view which obtains."

It was next held that such acquisition and control of an airport is a city purpose within the purview of general constitutional law. In so holding the court said:

"It is next contended by the appellant that, even if it be held that the acquisition and maintenance of an airport is a public purpose, it is not a municipal or city purpose. By this he means, as we understand, that such acquisition and maintenance does not fall within the scope of the powers which may be constitutionally delegated to a city.

"* * * * * Cities have long exercised the power: To acquire, construct, maintain, control, supervise and regulate docks, wharves, and harbor facilities, including the making of river and harbor improvements in connection therewith; to own and operate ferries; to lay out and improve roads and highways; and to construct and maintain canals, bridges and other works of internal improvement of a public character. The building of a bridge connecting the cities of New York and Brooklyn by those cities, was held to be a city purpose as to each. *People v. Kelly*, 76 N.Y. 475, 487. It was also held by this court that the building of a bridge across the Mississippi River at St. Louis for the benefit of the public, by the City of St. Louis, was a public city purpose. *Haeussler v. St. Louis*, supra. An airport with its beacons, landing fields, runways, and hangars is analogous to a harbor with its lights, wharves and docks; the one is the landing place and haven of ships that navigate the water, the other of those that navigate the air. With respect to the public use which each subserves they are essentially of the same character. If the ownership and maintenance of one falls within the scope of municipal government, it would seem that the other must necessarily do so. We accordingly hold that the acquisition and control of an airport is a city purpose within the purview of general constitutional law."

What was said in *Dysart v. City of St. Louis*, supra, is likewise applicable to counties, that it is for a public purpose

Honorable Roger Hibbard

-6-

April 20, 1943

and is also considered as a county purpose as referred to in the Constitution of the State of Missouri.

Therefore, it is the opinion of this Department that the county court may appropriate funds to purchase and operate an airport. However, while the above statutory provisions authorize the expenditure of funds for airports and landing fields we must not lose sight of the Constitution, namely, Section 11, 12, Article X, which places a limitation upon the amount of taxes any county may levy.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

ARR:EAW

TAXATION: BD. OF EQUALIZATION:
ASSESSORS: OMITTED PROPERTY:

County assessor may not add personal property to assessment rolls after he has turned his books over to the county clerk. The county board of equalization may not put on the tax rolls omitted personal property for any year other than the assessment which was made on June 1 next before the session of said board.

April 28, 1943



Mr. Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

This is in reply to your letter of April 23, 1943, requesting an opinion from this department, which letter is as follows:

"A resident of Marion County died February 24th, 1942 leaving among other things certain checking accounts in two local banks and a certificate of shares in two local building and loan associations. On March 5, 1942, prior to the filing of an inventory in the estate, the executor distributed the forementioned property. The inventory of the estate showing the mentioned items was filed May 20, 1942, after the adjournment of the Marion County Board of Equalization which adjourned on the fourth Monday of April. The County Assessor, after the adjournment of the Board of Equalization in 1942, from the records of the Probate Court made an assessment on these assets for personal property tax. It is the contention of the Executor that since these funds have been distributed as of March 5, 1942, that the Board of Equalization has no authority now to add an assessment for 1942 tax.

"The specific question which the County Board of Equalization has asked to have determined is their right during the 1943 session to make this assessment under the facts described for the prior

year, and also the right of the Assessor to go back previous years after the Board of Equalization has adjourned for those years."

Your question resolves itself into, first, the authority of the assessor to make an assessment of personal property after he has turned his books over to the county clerk, second, the authority of the county board of equalization to assess omitted property for any year other than the one which is made as of June 1, next, prior to the meeting of said board, and, third, whether or not an estate which has been distributed prior to the filing of a semi-annual statement is subject to taxation against the executor who may be administering on such an estate on June 1, 1942.

On the first question, under Section 10950, R. S. Missouri 1939, it is the duty of the assessor to make the assessment between the first day of June and the first day of January of each year.

Under Section 10957, R. S. Missouri 1939, it is the duty of the assessor to take from each executor and every other person legally in charge and control of any estate, or from the papers and records of the court relating to such estates, a list of personal property, and to assess the same according to law.

Under Section 10990, R. S. Missouri 1939, the assessor is required to make out and return to the county court a copy of his books. This must be done on or before the twentieth of January each year.

In speaking of the jurisdiction of the assessor to make an assessment after the assessor has performed his duties under this section, the court, in Wymore et al. v. Markway, 89 S. W. (2d) 9, 13, said:

"* * Also, the assessor is required to make out and return to the county court, by January 2d, a verified copy of his assessor's book (section 9800 (Mo. St. Ann. Section 9800, p. 7903)); and the return of this book to the county clerk's office completes the assessment and terminates his jurisdiction. The principle is firmly established that in making assessment he acts in a judicial capacity."

This statement clearly indicates the assessor cannot add an assessment of personal property to his books after he has turned them over

to the county clerk. However, Section 10977, R. S. Missouri 1939, would seem to indicate otherwise, but from the cases hereinafter referred to it will be seen that this section refers to real estate. In the case of *State v. Comer et al.*, 101 S. W. (2d) 57, the court held that this section only applied to real estate, and it also held that when the assessor turned his books over to the county clerk his jurisdiction to make an assessment of personal property ended.

In speaking of the authority of an assessor to make an assessment of personal property for back years, the St. Louis Court of Appeals, in the case of *City of Hannibal ex rel. v. Bowman*, 98 Mo. App. 103, 1. c. 108, said:

"There is, therefore, no such thing as an equity in a county or in a city that will authorize an assessor, after he has completed his assessment and turned over his books to the proper officer and after his assessment has passed the boards of equalization and of appeals, to repossess himself of the assessor's books and enter therein personal property, which by accident or intention was omitted from the list furnished by the taxpayer and which escaped the notice of the assessor. He can only proceed at the time and in the manner pointed out by statute and to justify his assessment he must be able to put his finger on the statute that gives him the authority to make it. * * * * *

In the case of *Cape Girardeau v. Beuhrmann*, 148 Mo. 198, a case with facts similar to your question was before the Supreme Court and it was there held that the assessor could not assess omitted personal property for back years. However, the court, in referring to the general statute, which is now Section 10977, R. S. Missouri 1939, said:

"* * * The general statutes of the State only permit this back assessment of real estate and they govern in the city as well as the county. * * * * *

In speaking of these two opinions the Supreme Court, in *State ex rel. Ford Motor Co. v. Gehner*, 27 S. W. (2d) 1, 325 Mo. 24, 33, said:

"To the same general effect is *Hannibal ex rel. v. Bowman*, supra. If the assessors in the *Buehrmann* and *Bowman* cases were without authority to assess additional personal property where the taxpayer in the previous years had returned an insufficient amount of such property, how can it be possible that respondent assessor may go back two years to make an additional assessment for income actually appearing on the face of relator's return which was not taxed because relator, with the concurrence of the assessor at the time and without subsequent challenge from the board of equalization, was knowingly permitted to omit same from the assessment as a claimed deduction?

"Respondents cite Sections 12819, 12801 and 12969, Revised Statutes 1919, in support of the contention that respondent assessor had jurisdiction to correct the omission in relator's 1926 income-tax assessment. Section 12819 provides a scheme for subsequent assessment and collection of taxes where 'there has been a failure to assess the property in any county for any year or years.' This section covers the situation where the entire assessment for the county has been omitted for any year or the assessment sought to be made had been held void for some reason. The section has no application to the omission of assessable personal property from the return of an individual taxpayer. *State ex rel. Howard v. Timbrook*, 240 Mo. 226, 1. c. 240, 144 S. W. 843, cited by respondents, held this section applicable where the entire assessment for the year was void. See, also, *Hannibal v. Bowman*, supra.

"Section 12801 is as follows:

"No assessment of property or charges for taxes thereon shall be considered illegal on account of any informality in making the assessment, or in the tax lists, or on

account of the assessments not being made or completed within the time required by law.'

"This section does not give the assessor authority to make a given assessment but, where he has such authority, mere subsequent informalities will not invalidate the assessment. * *"

Referring again to your letter, we find that the assessor attempted to assess the estate after the board of equalization had adjourned in 1942. The 1942 tax would have been paid on the assessment made as of June 1, 1941. The assessor, under the authorities hereinbefore cited, lost jurisdiction to assess this property when he turned his books over to the county clerk in January, 1942.

If after the assessor turns his books over to the county clerk he finds personal property which has not been assessed, then he could follow the procedure prescribed in Section 10956, R. S. Missouri 1939. Under this section the assessor should give a notice in writing to the board of equalization and then the board of equalization gives notice to the taxpayer and the matter is heard and determined by that board. Also under Section 11006, R. S. Missouri 1939 the board of equalization could have added this omitted property in 1942 by following the procedure prescribed in that section. However, from your letter it appears that the property was not discovered until after the board of equalization had adjourned. Therefore, the assessor could not resort to the means prescribed in the foregoing section to get this property placed upon the tax rolls nor could the board of equalization add this property.

As to the authority of the assessor and the board of equalization to make assessments of omitted property we particularly refer you to the case of State ex rel. v. Walden, 60 S. W. (2d) 24. In that case the court discussed the various stages of an assessment at which the assessor or the board of equalization might act. The court in this case also discussed the powers and duties of the State Tax Commission with reference to the assessment of omitted property.

Since the property in question was discovered after the board of equalization had adjourned but before the tax rolls were turned over to the collecting officials the proper procedure to have placed this property on the books for 1942 tax is prescribed by Section 11028, R. S. Missouri 1939. This section provides in part as follows:

"After the various assessment rolls re-

quired to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. * "

Your letter also indicates that the executor takes the view that since he did not have or hold this property on June 1, 1942, it is not taxable to him as executor even though the inventory showed the property. The assessment for 1942 would be for the taxes payable in 1943. Your letter also indicates that the executor distributed this property soon after his appointment and before six months after the appointment had expired. Under Section 10957, as stated above, it is the duty of the assessor to obtain from the executor, or the papers of the estate, a list of the property which is subject to taxation. Under Section 10940, R. S. Missouri 1939, every person owning or holding property on June first is liable for taxes for the ensuing year. Then if the executor was, under the law, holding this property on June 1, 1942, it was subject to taxation and could yet be placed on the tax rolls by following the procedure prescribed in Section 11006, supra, which authorized the county board of equalization to assess omitted property, or it could be placed on the tax rolls by the

April 28, 1943

State Tax Commission by following the procedure prescribed in Section 11028, supra.

As stated in your letter, the executor distributed the personal property before the inventory was filed and also before the first settlement was made. We may assume that the executor showed this distribution to the probate court at the time he made his first settlement. Mr. Limbaugh, in Volume Two on "Missouri Practice and Forms" at Section 927 makes this statement on the question:

"Since settlements cannot be made until after the estate has been in the process of administration for six months, no partial distribution can be made until six months after the date of the letters."

This statement may be correct. However, it does not say that a distribution that is made prematurely would be void, and that the title or ownership of the property distribution would not pass to the distributee. In Volume 24 C. J., page 473, Section 1281, we find the rule as to the making distributions of estates as follows:

"* * * Nevertheless it is the duty of the representative to make distribution as soon as is consistent with the rights of creditors and his own safety; and where it is made apparent that there are more assets on hand than will be necessary for the payment of debts and expenses of administration, the court may direct distribution before the time ordinarily allowed for settlement of estates has elapsed, or, under such circumstances, the representative may pay over legacies or distributive shares in advance of such time, taking a refunding bond from those who are thus paid. * *"

Under Section 235, R. S. Missouri 1939, it is provided that the executor shall not be compelled to make distribution until six months after the date of the letters. It will be noted this section does not prohibit the executor from making a distribution sooner than six months after the date of the letters if he is willing to assume the responsibility that he may incur on account of making the early distribution.

We think the executor, in making this early distribution,

did not violate the statute, and since no appeal or objection was made or taken to this distribution that his acts became valid upon approval by the court and that the ownership and possession of the property distributed passed from the executor to the distributee so that he did not own or hold the property on June 1, 1942 subjecting him to taxes thereon.

CONCLUSION

(1) From the foregoing it is the opinion of this department that an assessor is not authorized to make an assessment of personal property after he has turned his books over to the county clerk.

(2) That the county board of equalization is not authorized to assess omitted personal property for any year other than the assessment which is made as of June 1, next, prior to the meeting of said board.

(3) That personal property which has been distributed by an executor prior to the time of filing a semi-annual settlement and passes from the possession and ownership of such executor so that he is not liable for taxes on such property which is shown in the inventory of the estate.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:DA

COUNTY
ASSESSOR'S
COMPENSATION:

De jure officer entitled to compensation
instead of de facto officer who performed
assessor's duties.

January 12, 1943

Honorable W. W. Holmes
Prosecuting Attorney
Maries County
Vienna, Missouri



Dear Mr. Holmes:

Receipt is acknowledged of your letter of January 5, 1943, in which you request an opinion as follows:

"I would like your opinion with reference to the following situation, viz:

"Charles W. Leismann was elected Assessor of Maries County in 1940, entering upon the duties of his office, made the 1941 Assessment and about January 1st, 1942, volunteered and entered the U. S. Army and is now in service in Africa. January 1st, 1942, he also appointed Albert K. Spurgeon his Deputy who also entered upon his duties and on June 1st, 1942, the County Court made the following order with reference thereto, viz:

"In the matter of 1942 Assessment.
Now at this day the Court having under consideration the assessment of property in Maries County, Missouri, for the year of 1942, based on the ownership of property on June 1st, 1941, and the Court being aware that our County Assessor, Chas. W. Liesman is in the United States Army in the State of Texas and the duties of the office being attended to by his Deputy Mr. Albert Spurgeon, it is ordered by the Court that Mr. Albert Spurgeon proceed at once to make 1942 Assessment and if for any reason his legal capacity should be attacted and he hereby lose said position that Maries County shall

be obligated to pay him for all lists made and work done so long as he acts in capacity of deputy assessor under his present appointment.'

"As was anticipated, some time near this date, Gov. Donnell appointed Mr. Warren Gillispie to the office of Assessor Maries County, and before he took over, Mr. Albert Spurgeon had made some 170 lists or thereabouts on the 1942 Assessment and since that time Mr. Gillispie has been acting and made the remainder of the 1942 assessment and has made up the Assessor's books for 1942 and turned them over to the County Court on or about December 31st, 1942, and filed his bill for payment for assessing and making his books for 1942 in the sum of \$708.53 for the State part and \$763.98 for the County part, and on Dec. 31st, 1942, the County Court having previously advanced him \$239.15 on this account issued to him a County warrant for \$524.83 the balance of the County bill.

"The Court, before the delivery of the warrant, fearing that they might be called upon to pay the account twice or both to Gillispie and Spurgeon, if they were called upon to do so ordered this warrant not paid and are withholding the delivery of the same, pending investigation.

"You will understand, that this situation hinges very much on the same situation as in the case of State ex rel vs. Wade Wilson, decided by the Supreme Court recently with reference to the office of clerk of the Circuit Court of Henry County, Missouri.

"Under the Court order of June 1st, 1942, Spurgeon, as I am advised, would have due him the sum of \$39.15 for the 170 lists, or thereabouts that he made, be-

fore turning over to Gillispie.

"Prior to the time when filings were to close for the August, 1942, primary election, Gillispie filed as a candidate on the Republican ticket and Spurgeon and two other parties filed on the Democratic ticket, but Spurgeon was nominated, leaving Gillispie and Spurgeon on their respective tickets for the November 1942 General election and Spurgeon was elected. However, when the votes were certified to the Secretary of States' office for the issuance of commissions, none was sent to our County Clerk for the Assessor's office for Mr. Spurgeon. I am advised, in this connection, that in a telephone conversation between our County Clerk and the Secretary of State's office that our Clerk was advised that they considered Charles W. Liesman was still Assessor of Maries County.

"With all these facts stated, for the advice and information of our County Court, who is entitled to the pay from Maries County for the Assessment made in 1942? It is well to bear in mind, in this connection, that the Assessor receives certain compensation for specific duties performed and is not on a salary basis.

"Should the County Court go ahead and release this warrant to Gillispie would they be obligated to pay Liesman or Spurgeon also if they were to file bill for it and ask for it?

"On January 4th, Spurgeon delivered to a member of the County Court a demand for the office, books, papers, etc., to be turned over to him.

January 12, 1943

"Hoping to receive your opinion as soon as convenient as to whom is entitled to be paid for the 1942 assessment, I am,"

The solution of your problem seems to hinge upon the determination of who held the title of the office of Assessor of Maries County during the year 1942, for the law seems to be well settled that the compensation of an officer is incident to the office, and the person who holds title to the office is entitled to the compensation attached thereto. In support of this statement the following cases are cited:

State ex rel. Evans v. Gordon, 245 Mo. 12, l.c. 28:

"It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. As to the right of the de facto officer to draw the salary during his incumbency, the authorities are not harmonious. Both Throop and Mechem lay down the rule, based upon New York decisions, that the de facto officer has no right to the salary, and this because a claim for salary must be based upon title. (Throop on Public Officers, Sec. 517; Mechem's Public Offices and Officers, Sec. 331.) And such is the holding in many jurisdictions. Our court, in several cases, adheres to the contrary doctrine. (State v. Draper, 48 Mo. 213; State v. Clark, 52 Mo. 508; State v. John 81 Mo. 13; Dickerson v. Butler, 27 Mo. App. 9; State ex rel. v. Walbridge, 153 Mo. l.c. 202.) All the authorities, however, agree that the de jure officer, on establishing his title, may recover from the de facto officer the compensation which the latter has received."

The same ruling is announced in the case of Luth v.

Kansas City, 203 M. A., local citation 113. An early case announcing the same rule is Mullery v. McCann, 95 Mo. 579, from which case the following quotation is taken from page 583:

" * * * * * The right of a de-jure officer who is ousted from his office by an intruder to recover from such intruder the fees received by him during his occupancy of the office, cannot be seriously questioned. But before such recovery can be had the plaintiff must show a valid title to the office, for it is only on the theory that he is de-jure an officer that he can recover. * * * * "

And the case of State ex rel. Abington v. Reynolds, 280 Mo. 446, is a later case than any of the above and follows the same rule and from which case the following quotation is taken at l.c. 455:

" * * * * * In ruling to the contrary the Court of Appeals contravened the opinion of this court in State ex rel. Evans v. Gordon, 245 Mo. l.c. 28, in which we held it to be settled law that compensation is an incident to the title to an office and that it belongs to the de-jure officer, who may upon establishing his title thereto, recover the fees of same from a de-facto officer who has received them. The rule should and does apply with more strictness to one who has usurped an office belonging to another and has received the fees of same. (Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299; 22 R. C. L. title 'Public Officers.' sec. 244.)"

The Abington Case is a case which involved the fees of a county collector.

In citing and relying upon the cases above and cases announcing a similar rule we are not unmindful of the fact that there are decisions of the Missouri courts which have held that the person who performs the duties of the office is entitled to receive the compensation; but the cases we have cited and are relying on are later than any we have found announcing the contrary rule, and for that reason we are following them.

In the quotations herein used are the words, de facto officer and de jure officer. In Volume 27 C. J. those terms are defined. The definition of the term, officer de jure, is found on page 927, paragraph 13:

"An 'officer de jure' is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law."

As this definition is clear and unambiguous no Missouri cases are cited supporting it. The term, officer de facto, is defined on page 1053, paragraph 366:

"An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce

people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action; and, in some, although not all, jurisdictions, only when the office has a de jure existence."

Supplementing this definition of an officer de facto, the following quotation is taken from the case of Usher v. Telegraph Co., 122 M. A. 98, l.c. 111:

"It appears that Van Pool was elected by electors who were authorized to elect a special judge in certain contingencies. If we concede no such contingency as the statute contemplates had arisen, yet it is a fact that these electors, acting under a mistaken view of their right, did elect a special judge and that he assumed the duties of the office. He thereby became a judge de facto and his act in extending time for filing was a valid act. In State v. Carroll, 38 Conn. 449, it was laid down that, 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity

in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.' The third of these rules applies to this case. That case is cited and strongly approved in Perkins v. Fielding, 119 Mo. 149, 152, and Simpson v. McGonegal, 52 Mo. App. 540. As bearing directly on this question, see State v. Lewis, 107 N. C. 267; Ball v. United States, 140 U. S. 118, and McDowell v. United States, 152 U. S. 526. We do not regard the phrase occurring in the opinion in State v. Miller, 111 Mo. 549, viz., 'when the conditions giving the right of appointment existed,' as meaning to interfere with the rule as stated in the cases just cited."

This definition is cited with approval in the late case of State v. LaMance, 346 Mo., l.c. 491.

Missouri is a state in which there must be a legal office before there can be a de facto officer. There is an office of county assessor under the Missouri Law, Section 10943 R. S. Mo., 1939. From the statement of facts in your letter, it may be safely assumed that Charles W. Liesman was the duly elected de jure assessor of Maries County and no question was raised about his being such until he volunteered his service and entered the United States Army.

It is upon the occurrence of a vacancy in the office of county assessor the Governor has authority to make an appointment to fill such vacancy.

The law recognizes that the holder of an office may abandon his office and thereby forfeit his title and all rights appertaining thereto and this rule is recognized in Missouri in the case of Langston v. Howell County, 108 S. W.

January 12, 1943

(2d) 19, 336 Mo. 444, decided by Division I of the Supreme Court in June, 1937. The doctrine of implied resignation is also recognized where an officer voluntarily leaves the performance of the duties of the office and engages in some other endeavor which prevents performance of the official duties.

The writer has until quite recently considered that a voluntary enlistment in the armed forces should constitute an abandonment or an implied resignation of an office, thereby creating a vacancy, and in a written opinion to The Honorable Forrest C. Donnell, Governor of Missouri, expressed the belief that such was the law, and that the Governor would be authorized to make an appointment to fill a vacancy thereby created. This opinion related to the office of prosecuting attorney and was furnished to the Governor prior to the action of the Governor in appointing Mr. Gillispie assessor of Maries County. Governor Donnell, apparently following the previously given opinion, upon learning the facts of the entrance of Mr. Liesman into the army, in good faith undertook to make this appointment.

On December 7, 1942, the Supreme Court, en banc, rendered its decision in the case of State ex inf. McKittrick v. Wade Wilson, numbered 38087, not yet officially reported, which was a test case brought for the purpose of determining if induction of a county officer into the army under the Selective Service Law of the United States created a vacancy in the office. The Court held such induction did not create a vacancy, and the following quotation is taken from this case:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

The decision of the above case was written by Judge Douglas and concurred in by four other judges (Gantt and Hays J. J. being absent). The last sentence above quoted was not necessary to a decision in the case and is not a part of the law of the case, and it is not mandatory that it be followed. However, it appears it might be taken as a clear indication of the views of the five members of the Court, the writer and the four concurring judges, as to the effect of a voluntary enlistment by a county officer into the armed forces of the United States during the present emergency. The writer was connected with the Wilson Case, supra, and knows the Court had cited to it a number of cases involving absence by officers from their duties, both voluntary and involuntary, and feels the above sentence would not have been permitted to remain even as dictum had the judges not concurred it to be a true expression of the law. If this is true, then there existed no vacancy in the office of assessor of Maries County which would have authorized the Governor to make an appointment.

Your letter makes no mention of a resignation by Liesman or of any judgment of ouster against him or of his death. Gillispie entered the office under a purported appointment made in good faith but void because no vacancy existed.

Mr. Spurgeon, the deputy, was appointed under statutory authority and received his authority and such compensation as he was entitled to by and through his principal, the de jure officer, and could be entitled to no compensation except such as comes by reason of his lawful appointment as a deputy.

CONCLUSION

From the foregoing, the conclusion follows that Charles W. Liesman was the duly elected and qualified de jure assessor, who had not resigned, been ousted or died, during the period of time mentioned in your letter, and as such was entitled to any compensation accruing to the office of assessor of Maries County during that time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

REAL ESTATE COMMISSION: Licensed broker and
licensed attorney may act
in dual capacity.

January 27, 1943

Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of January 25, 1943, which reads as follows:

"The Commission desires a ruling from your office on the following. A Kansas City Lawyer who is also a licensee of the Missouri Real Estate Commission endeavored to sell a prospect a property owned by the Home Owners Loan Corporation, a Government Agency, and had he been successful in closing the deal he would have been paid a commission by the Government Corporation for his services however after submitting the clients offer to the Home Owners Loan Corporation the client changed their mind and wired the Home Owners Loan Corporation that they no longer desired to buy the property and withdrew their offer. The licensee who is also a lawyer had accepted a deposit on the sale, when asked by the client to return the deposit, returned part of it, and retained the balance stating he

January 27, 1943

was keeping it as an attorney fee. The client has sent a sworn complaint to the Commission requesting the return of their deposit.

"Can the licensee act in the dual capacity of licensed real estate broker and a licensed attorney. The complainant states that they did not hire the licensee as an attorney and their transactions were purely one of prospect and real estate broker."

Section 3, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 425, partially reads as follows:

" * * * This act shall not apply
* * * nor shall this act be construed to include in any way the service rendered by an attorney-at-law in the performance of his duties as such; * * * * * ."

If the licensee described in your request was an attorney representing the Home Owners Loan Corporation, it would not be necessary that he should hold a salesman's or broker's license, as set out in the above partial quote.

Your main question is: Can the licensee act in the dual capacity of licensed real estate broker and a licensed attorney?

Since your request states that the Kansas City lawyer is a licensee of the Missouri Real Estate Commission, it can be presumed that he is qualified to act as a real estate salesman or broker. In reading the whole act we do not find any prohibition that would prevent an attorney's receiving a Missouri Real Estate Commission license.

The question as to whether a licensed real estate broker can act in a dual capacity depends entirely upon the facts in each case. The complainant, according to your request did not employ the attorney as an attorney-at-law, but as a prospect made an offer to buy real estate owned by the Home Owners Loan Corporation and made a down payment to the representative of that corporation who was either acting as an attorney, or real estate broker for the corporation. The facts in the request do not state in which capacity he is acting for the Home Owners Loan Corporation, but states that in case the real estate deal was consummated he would have received a commission from the Home Owners Loan Corporation.

If the offer was subject to the approval of the Home Owners Loan Corporation, and was withdrawn previous to the acceptance of the offer, the complainant would be entitled to all of the payment made as part payment to bind the bargain.

Under the facts it can be presumed that the Home Owners Loan Corporation recognized that the complainant was authorized to withdraw his offer, or it would not have authorized the Kansas City attorney to return any part of the deposit on the offer to buy. In your request you refer to the complainant as the "client of the attorney" and in the same request you also state that the complainant did not employ the licensee as an attorney.

We are assuming that the Kansas City attorney was not employed as a real estate broker by the complainant, or he would not have withheld part of the down payment as attorney's fees.

A real estate broker may represent both the buyer and the seller, providing the same is well known to each, and no fraud is committed by the broker. It was so held in Windsor v. International Life Insurance Company, 29 S. W. (2d) 1112, and Bopp v. Jetama Investment Company, 96 S. W. (2d) 877.

Since the complainant states that he did not employ the licensee as an attorney, it would be a question of fact to be decided in a proper litigation, but since the Kansas City attorney has returned part of the down payment and has retained part as an attorney fee, the question as to his authority to charge a commission is not involved.

It may be said that if the Kansas City Attorney was also attorney and real estate broker for the Home Owners Loan Corporation, he could also be attorney for the complainant in this case, providing he complied with the rules of the Supreme Court on such matter. The rules on such matters are contained in Section 6 of the Supreme Court Rules, which partially reads as follows:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given

January 27, 1943

after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Under the facts in your request, the complainant knew that the Kansas City attorney represented the Home Owners Loan Corporation in one of the two capacities. As to any action by the complainant against the Kansas City attorney, it would be a question of fact for a jury to decide whether the attorney was employed by the complainant in the real estate transaction consisting of an offer to buy.

However, your main question seems to be whether a licensed real estate broker and a licensed attorney can act in a dual capacity.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that a licensee under the Missouri Real Estate Commission Act may act as a licensed real estate broker and a licensed attorney, in a dual capacity, with the knowledge of the buyer and seller, where no fraud has been perpetrated.

APPROVED:

Respectfully submitted

W. J. BURKE

Assistant Attorney General

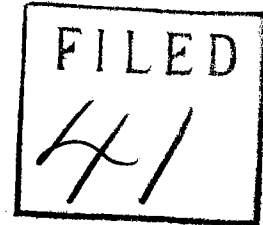
ROY McKITTRICK

Attorney General of Missouri

WJB:RW

CRIMINAL State cannot pay board bill in criminal
COSTS: cases until money has been advanced by
county and paid the sheriff.

February 4, 1943



Mr. W. A. Holloway
Chief Clerk
Office of State Auditor
Jefferson City, Missouri

Dear Mr. Holloway:

Under date of January 29, 1943, you wrote this
office requesting an opinion as follows:

"St. Louis County has presented cost bills, in
criminal cases, which are payable by the State,
and in which is included board bills of prison-
ers confined in the St. Louis County jail.

"We have ascertained that on December 3, 1941,
the St. Louis county court made the following
order:

"It is ordered by the Court that the County
of St. Louis, Missouri, shall furnish and pro-
vide board to prisoners in the St. Louis Coun-
ty jail and the Juvenile Detention Home during
the year 1942 and shall receive therefor Seven-
ty-five cents (\$0.75) per day for each such
prisoner.

"And it is further ordered that the Purchas-
ing Agent of St. Louis County shall purchase
the food necessary to feed and board such pri-
soners and the Sheriff of St. Louis County is
hereby relieved of said duty as is provided by
law."

"And, that on the 11th day of January, 1943,

Mr. W. A. Holloway

-2-

February 4, 1943.

the County Court of St. Louis County made the following order:

"It is ordered by the Court that the County of St. Louis, Missouri, shall furnish and provide board to prisoners in the St. Louis County Jail and the Juvenile Detention Home during the year 1943 and shall receive therefor Seventy-five cents (\$0.75) per day for each such prisoner. And it is further ordered that the Purchasing Agent of St. Louis County shall purchase the food necessary to feed and board such prisoners and the Sheriff of St. Louis County is hereby relieved of said duty as is provided by law."

"I am requesting an official opinion as to whether the State is liable for the costs of the board of prisoners in cases where the State is liable for the costs in criminal cases under the orders of the County Court as set out above.

"We make this request by reason of the fact that under Section 13413, R. S. Missouri, 1939, the legislature allowed sheriffs, marshals and other officers a certain amount for the board of prisoners confined in the County jail."

By the provisions of Section 9195 R. S. Mo., 1939, the sheriff of each county is made the jailer:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct

he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice.'

In addition to this section attention is also invited to Section 9202 R. S. Mo., 1939:

"Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Section 13413, Article 2, Chapter 99, of R. S. Mo., 1939, mentioned in your letter, is as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

Section 13417 of the same article and chapter makes the following provision for fixing the board allowance by the county court:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

In connection with the foregoing section of the statutes it is desired to also call attention to Section 13774:

"Hereafter when any person or persons shall be confined in the common jail for any criminal offense, the sheriff or jailer may make out and present to the county court at its regular session, a bill for all board due him for the board of such prisoners; such bill shall specify the offense with which each prisoner is charged, and shall be audited and allowed by such county court, and the clerk thereof directed to draw a warrant for the aggregate amount thereof. When the final determination of any criminal prosecution shall be such as to render the state liable for costs under existing laws, it shall be the duty of such county clerk to certify to the clerk of the circuit or criminal court in which the case was determined, the amount due the county for boarding said prisoners; it shall then be the duty of the clerk of the circuit or criminal court in

which the case was determined, to include in the bill of costs against the state, all fees for board of prisoners theretofore paid by the county, setting forth the fact that such fees are due the county, and the fees for board which have accrued since the last payment by the county, shall be stated separately as being due the sheriff or jailer. Such fees due the county when collected by the clerk of the circuit or criminal court shall be immediately paid into the county treasury."

From the foregoing general statutes it is quite apparent that the sheriff or the jailer appointed by the sheriff is responsible for the boarding of prisoners. The county court's duties are to fix a limit to be paid for the board of prisoners, to audit the monthly accounts of the sheriff for the board of prisoners and to advance the payment of these accounts out of the county funds until final determination of the case. Upon final determination of a case the amount advanced for the board of a prisoner is certified by the county court to the circuit clerk and is repaid to the county.

The county courts are created by Section 36 of Article VI of the Constitution:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

These courts are courts of record of limited

jurisdiction and their principal function is to serve as the financial managers of the county. They are not general agents for the counties and have only such powers as are given to them by the statutes, and their actions outside the scope of the powers expressly conferred and those which are by implication necessary to carry out the implied powers are null and void. *Bayless v. Gibbs*, 251 Mo. 492; *State ex rel. Major v. Patterson*, 229 Mo. 373. Further, in this connection, attention is called to the following quotation from the case of *Morris v. Barr*, 342 Mo. 179, 1.c. 183:

"In *Sturgeon v. Hampton*, 88 Mo. 203, at 213, the rule was early announced which has been generally recognized in this State as follows: 'The county courts are not the general agents of the counties or of the State. Their powers are limited and defined by law. These statutes constitute their warrant of authority. Whenever they step outside of and beyond their statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

A search of the statutes has been made for any law which would authorize the county court of St. Louis County to relieve the sheriff of his statutory duty of boarding the prisoners in the jail. No such authority has been found; therefore, the purported order relieving the sheriff of his statutory duty would be null and void.

The State is only authorized to repay to the county such amounts as have been properly advanced to the

Mr. W. A. Holloway

-7-

February 4, 1943

sheriff for the payment of the board. Under the purported orders which are null and void the county clerk could not honestly certify to the circuit clerk that any amount had been advanced by the county to the sheriff for the purpose of paying board bills of persons in jail. It is only when the amounts have been certified to the circuit clerk by the county clerk as having been advanced that the circuit clerk would have authority for including these amounts in fee bills. It follows that the State could not reimburse the county for board bills which it has not paid to the sheriff.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

OFFICERS:
PROBATE JUDGE OF
JASPER COUNTY:

Where duties are performed by several persons during a year each person is entitled to proportionate share of the annual compensation.

February 19, 1943



Mr. W. A. Holloway, Chief Clerk
State Auditor's Office
State Capitol Building
Jefferson City, Missouri

Dear Mr. Holloway:

Under date of February 12, 1943, you wrote this office requesting an opinion as follows:

"Judge Adolph McGee, Probate Judge of Jasper County, died March 18, 1942, and a special judge was appointed by the members of the bar, who served as Judge of the Probate Court until the vacancy was filled by the appointment of Judge W. W. Burden, who was appointed by the Governor.

"We request the opinion of your office as to whether or not the fees collected during the periods in which they were or will be in office, should be limited only to the fees which the probate judge is allowed to retain during any whole year in office, which would be \$4500.00 or should the amount of fees each is allowed to retain be figured on a ratio of the compensation he is allowed to retain is to the time he served, as \$4500.00 is to one year."

The compensation of the Judge of the Probate Court of Jasper County is fixed by Section 13404, Article 2, Chapter 99, R. S. Mo., 1939. This section fixes a

schedule of fees that may be charged by judges of probate courts and provides in part as follows:

" * * * * * Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund. *

* * * * *

The Supreme Court en banc had occasion to construe this section and apply it to the Probate Judge of Jasper County in the case of State ex rel. Jasper County v. Gass, 317 Mo. 744, 296 S. W. 431. From this case at l.c. 750, 751, Missouri citation, the following quotation is taken:

"The lawmakers of 1921 knew the Supreme Court had, on the 13th of March, 1920, in the case of State ex rel. Buchanan County v. Imel, 280 Mo. 554, 219 S. W. 634, limited the compensation of the Probate Judge of Buchanan County to the \$2000 allowed to circuit judges as compensation for judicial services. They also knew, that on the 1st of October, 1920, the Supreme Court, in the case of Macon County v. Williams, 284 Mo. 447, 224 S. W. 748, held the \$1200 allowed to the circuit judges for expenses could not be considered by the Probate Judge of Macon County in determining the amount of his compensation during the year. They were not satisfied with the salary allowed probate judges, hence the amendment to said Section 10991. The circuit judges of Jasper County have only two sources of compensation: compensation for judicial services, and compensation for services as jury commissioner. The statute as amended provides that in determining the salary of the probate judges, the compensation of the circuit judges from all sources must be considered. If we follow the statute, we must hold that the words 'from all sources' include the compensation of circuit judges as jury commissioners. It follows, and we hold, that from the taking effect of Section 10981, Revised Statutes 1919, as amended by the Laws of 1921, page 604, the compensation of the circuit judges of Jasper County and the amount allowed

to them for expenses are as follows: Compensation for judicial services, \$2,000; compensation for services as jury commissioner, \$2500; for expenses, \$1200 making a total of \$5700 per annum. Of these items the Probate Judge of Jasper County was entitled to consider the \$2,000 for judicial services and the \$2500 for services as jury commissioner in determining the amount he was entitled to retain out of the fees collected by him during the year for his salary."

This definitely fixed the compensation of the Probate Judge of Jasper County at four thousand five hundred dollars (\$4500.00) per annum plus ten per cent (10%) of all excess above the amount turned in to the county treasury.

Whenever a special judge is elected by the members of the bar to transact the business of the probate court in accordance with Sections 2458-2459, Article 11, Chapter 10, R. S. Mo., 1939, compensation allowed such special judge is fixed by Section 2461 of the same article and chapter:

"The attorney thus elected shall, during the period he shall act, have power to solemnize marriages, to administer oaths and affirmations, to take acknowledgments to deeds and all of the other powers and be liable to all of the responsibilities of the judge of probate, and shall receive for his services the same fees as the judge of probate is entitled to receive for similar services."

A vacancy occurring in the office of probate

judge is filled by appointment by the Governor. Section 2439, Article 11, Chapter 10, R. S. Mo., 1939:

"When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

An appointment made to fill a vacancy fills the vacancy in the term. State ex rel. Rosenthal v. Smiley, 304 Mo. 549, loc. cit. 558:

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion. * * * *"

The Constitution of Missouri, Section 8, Article XIV, prohibits increasing the compensation of any officer during his term of office:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of State ex rel. Emmons v. Farmer, 271 Mo. 306, at l. c. 314, it was held that this section of the Constitution applied to the term of office.

By this section of the Constitution and Section 13404 R. S. Mo., 1939, supra, the compensation for the Probate Judge of Jasper County was fixed for the entire term for which Judge McGee was elected. Any special judge elected in accordance with Section 2458, supra, would be entitled to receive during the time he served the same compensation as the regular judge received. The special judge would be entitled to charge the same fees for services as would the regular judge and would be subject to the same limitations.

The appointee of the Governor, appointed to fill the vacancy in the term, would succeed to all the rights and liabilities and be subject to all the limitations which were on the person whose term he was filling out.

The compensation for the Probate Judge of Jasper County for the term of office under consideration being fixed at \$4500.00 per annum plus ten per cent of the excess fees turned in, the regularly elected judge, the special judge and the judge appointed to fill the vacancy could altogether receive only that amount of compensation as a maximum. If this were not true it might be possible that the total compensation for the year paid to the various persons who performed the duties of the office would exceed the amount fixed by statute for the year, which is prohibited by the Constitution. Section 8, Article XIV, supra.

In making this statement it is recognized the

language of the Constitution is "The compensation * * * * of no State, county * * * * officer shall be increased during his term of office; * * * * ", and from this language it might be argued as the original incumbent had died the limitation is personal and would not apply to the person or persons filling the vacancy in the term.

Under date of February 16, 1942, this office furnished you an opinion on the question of whether an appointee to fill a vacancy in the term of office of a county treasurer could receive increased compensation provided for by statute after the commencement of the term of office of the officer elected and whose term was being filled out by an appointee. A portion of what was said in that opinion relates to an appointee receiving an increase of compensation while filling out a vacancy in a term would apply equally as well to any other situation whether an attempt might be made to pay a greater sum as compensation for one year of the term as was authorized by statute and a portion of that opinion is here copied:

"In the California case of *Larew v. Newman*, 23 Pac. 227, when a similar question was presented to the Supreme Court of California, the court ruled against allowing the person filling the vacancy to receive the increase in compensation. The following quotation is from this case:

"* * * * Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at \$650 per annum. This act enacted that its provisions for salaries "shall not affect the present incumbents;" and also

that a vacancy in an office should be filled by appointment by the supervisors, "the appointee to hold office for the unexpired term." Section 9, art. 11, of the state constitution, provides that "the compensation of any county * * * officer shall not be increased after his election, or during his term of office." Section 1004 of the Political Code provides that "any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills." We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed. The judgment is affirmed.'

"The case of Storke v. Goux, 62 Pac. 68, also a California case, in which it was sought to have the case of Larew v. Newman, supra, overruled, followed and cited with approval the Larew case. The case is also cited with approval in the case of Wilson v. Shaw, 188 N. W. 743, decided by the Supreme Court of Iowa

in 1922, and in the case of State ex. rel. Hovey v. Clausen, 251 Pac. 772, decided by the Supreme Court of Washington in 1922. In both of these cases the person filling the vacancy was denied the increased compensation. The Kentucky case of Bosworth v. Ellison, 147 S. W. 400, 148 Ky. 708, is also a case which is similar, and in which the case of Larew v. Newman, supra, is cited.

"The most recent case we find citing and following the Larew case, supra, is the case of Clark v. Frohmiller, 88 Pac. (2d) 542, decided by the Supreme Court of Arizona in March of 1939. In none of these cases was the constitutional provision identical with ours.

"The leading case allowing the person filling the vacancy to receive an increase in compensation which could not have been received by the person whose term was being filled, is the case of State v. Frear, 120 N. W. 216, 138 Wis. 536, 16 Ann. Cas. 1019. This case recognizes the rule announced in the case of Larew v. Newman, supra, as the general rule, but allowed the person filling the vacancy the increased compensation. The ruling was largely based on administrative interpretation acquiesced for over fifty years. This case is followed in the Oklahoma case of Carter v. State, 186 Pac. 464, 74 Okla. 31. The Montana case of State ex rel. Jackson v. Porter, 188 Pac. 375, allowed a person filling a vacancy in the office of district judge increased compensation which the person whose term was being filled could not have received. This case was decided upon the ground that constitutional provisions

prohibiting increase or decrease of compensation during a term of office, were placed in constitutions to prevent improper influence by the legislative branch of the government upon the executive and judicial branches of the government. The authority cited is 1 Kent's Commentaries, p. 393; The Federalist No. 79; 1 Scott's Federalist and Other Constitutional Papers, p. 431. After allowing the person filling the vacancy to receive the additional compensation, the court mentioned all of the above mentioned cases and a few others without comment and the decision was not based on any of them.

"In the early Tennessee case of *Gaines v. Horrigan*, 4 Lea Tenn. 608, a similar result was achieved. The constitutional provision there construed used the word 'time' instead of 'term', and the decision is based on the use of this word 'time.'

"The cases mentioned will serve to illustrate the lack of harmony in the decisions on similar questions. The cases allowing the person filling the vacancy to receive the increased compensation, while uniform in the result achieved, namely, permitting some person to have an increase in compensation, are not uniform in their reasoning or the authority upon which the decisions are based. The cases refusing the increase in compensation are more nearly uniform in the reasoning and all follow the case of *Larew v. Newman*, supra. As pointed out heretofore, the case of *State v. Frear*, 120 N. W. 216, 138 Wis. 536, recognizes it to be the general rule that the person filling the vacancy is not entitled to receive the increase in compensation, and indicates the general rule might have been followed, had it not been for the administrative interpretation in that state.

"The provision of the California constitution construed in the case of *Larew v. Newman*, supra, provided that the compensation of any county officer shall not be increased after his election, or during his term of office, and the statute relating to vacancies provided the person filling the vacancy should possess all the rights and powers, and be subject to all the liabilities, duties and obligations, of the officer whose vacancy he fills. The Missouri Constitution, Sec. 8, Art. 14, supra, provides that the compensation of no state, county or municipal officer shall be increased during his term of office."

The compensation of the probate judge is fixed on an annual basis. There is no provision for dividing it up into quarterly, monthly or weekly payments. Under this situation where several persons act in the office during one year and all are entitled to be paid on the same basis out of the amount that may be retained as compensation. The conclusion is obvious.

CONCLUSION

Each person performing the duties of the probate judge would be entitled to receive a proportionate share of the total compensation. The share of the compensation to be received would be on the ratio of the time he served to one year. By way of illustration, if one man served one month, another man three months and a third man eight months, the person serving

Mr. W. A. Holloway

-12-

February 19, 1943.

one month would be entitled to one-twelfth of the total compensation. The person serving three months would be entitled to three-twelfths of the total compensation and the person serving eight months to eight-twelfths of the total compensation.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

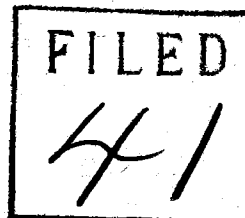
APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

REAL ESTATE COMMISSION: There is no authority for requiring the applicant to pay his 1942 fees before obtaining his 1943 license.

March 4, 1943



Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of February 11, 1943, which contains the following request for an opinion.

"The Commission would appreciate an opinion in regard to an applicant for a 1943 Real Estate License that was in the Real Estate Business and conducted a Real Estate Business in the year of 1942.

"The Commission sent out notices to all County Clerks and City Tax Collectors in the form of a placard notifying all persons of the Act passed by the 61st General Assembly prohibiting the sale, leasing, or making loans on real estate for a commission or valuable consideration without first securing a license from the Missouri Real Estate Commission. This warning was sent out again in January of 1943 to all Counties and to all City Tax Collectors and the Commission has written many reported violators informing them of the law.

"Now the Commission asks if it has proper knowledge that the applicant did operate in 1942 without a license may the Commis-

March 4, 1943

sion demand that the applicant pay a fee for both 1942 and 1943 if he applies for a 1943 license."

We find no section in the Missouri Real Estate Commission Laws of 1941 that authorizes the Commission to demand that the applicant pay a fee for 1942 before he shall be granted a license to operate during the year 1943. However, if the applicant should offer to pay a fee for 1942, this office perceives of no reason why the Commission would not be allowed to accept and retain the same.

The only sections that seem to be applicable to your case are Sections 1 and 17. Section 1 requires a real estate agent or real estate broker to have a license.

"After January 1, 1942, it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

Section 17 provides the penalty for anyone who violates any provision of this act.

"Any person or corporation violating any provision of this act shall be guilty of a misdemeanor, and, if a person, be punished by a fine of not more than \$500 or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment, and if a corporation shall be punished by a fine of not more than \$1,000. Any officer or agent of a corporation, or member or agent of a copartnership or association, who shall personally participate in or be an accessory to any violation of this act, shall be subject to the penalties herein prescribed for individuals.

March 4, 1943

This law shall not be construed to release any person from civil liability or criminal prosecution under the general laws of this state. The commission may cause complaint to be filed for violation of Section 1 of this act in any court of competent jurisdiction, and perform such other act as may be necessary to enforce the provisions hereof."

Under the facts of your case, the Commission may proceed against the present applicant, under Section 17, because under the facts stated in your letter he has violated Section 1.

CONCLUSION

There is no authority for requiring the applicant to pay his 1942 fees before obtaining his 1943 license.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY MCINTYCK
Attorney General of Missouri

WCB:MAW

REAL ESTATE COMMISSION:

May revoke, or suspend, on indictment although cause is still pending.

March 27, 1943

FILED
41

Honorable J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated March 26, 1943, which reads as follows:

"May the Commission request an opinion, if the Commission, after holding a hearing, can suspend the license of a licensee indicted by federal authorities on serious real estate charges. The purpose of this request is that there are now three licensees that are indicted by the Federal Government on serious charges, and there is a possibility that the cases may be in court for several years in the meantime, the licensees in question could continue to pray on the general public."

Section 10, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 428, partially reads as follows:

"The commission may upon its own motion, and shall upon written complaint filed by any person, investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of: * * * * *"

March 27, 1943

Under the above partial section the Commission has the power to suspend, or revoke, any license, by two forms of procedure. First, it may, on its own motion, suspend, or revoke, any license obtained by fraud, or any license of a licensee who is violating any of the subparagraphs in Section 10, which are marked "(a)" to "(k)", inclusive.

It will be noticed that it is discretionary with the Commission to revoke, on its own motion, but Section 10 further provides that it shall, upon written complaint filed by any person, investigate, revoke or suspend the license of a licensee. This part of Section 10, that they must make an investigation, is mandatory, but it is discretionary whether they should revoke or suspend the license.

In your request you state that three licensees are now indicted by the Federal Court, on serious real estate charges, and I am presuming that your inquiry is whether that is sufficient grounds to revoke or suspend their license although there has been no conviction at this time in any of the cases. Under Section 10, it is not necessary that there be a conviction, but the Commission may suspend, or revoke, on the violation of that section. Of course, the proper notice must be given, as set out in Section 11 of the Missouri Real Estate Commission Act, and, in case the Commission should suspend or revoke the license of the licensee, the licensee may appeal to the circuit court in the proper county.

Section 14, of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 430, provides that the Commission shall revoke forthwith the license of a licensee if he has been convicted of certain crimes therein set out. This section is mandatory, and it is not necessary that a complaint be made to the Commission. Section 10 of the act, does not require a conviction, before the Commission is authorized to suspend, or revoke, the license of a licensee. It cannot be said that both statutes, that is, Section 10 and Section 14, apply to the same state of facts; nor, can it be said that the legislature uselessly enacted two conflicting sections. In construing two conflicting sections it is the duty of the courts to keep the legislative intent in mind, if it can be ascertained, and the whole act, or such portions thereof as are *pari materia* should be construed together (*State ex rel.*

McKittrick, Attorney General v. Carolene Products Company, 144 S. W. (2d) 153, pars. 4-5, 346 Mo. 1049.)

Also, the Supreme Court in the case of State v. Wipke, 133 S. W. (2d) 354, pars. 1-3, 345 Mo. 283, in holding that the legislature would not enact a useless thing, in passing two sections of an act, one of which at first glance appears to be a useless enactment, said:

"It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent. Holder v. Elms Hotel Co., 338 Mo. 857, 92 S. W. 2d 620, 104 A. L. R. 339; State ex rel. Kansas City Power & Light Co. v. Smith, 342 Mo. 75, 111 S. W. 2d 513. Respondents rely upon this rule and cite cases of State ex rel. Dean v. Daves, 321 Mo. 1126, 14 S. W. 2d 990; Johnson v. Kruckemeyer, 224 Mo. App. 351, 29 S. W. 2d 730.

"With this rule in mind, we cannot agree with respondents that Section 13a must be construed with Section 19. To uphold the respondents, we would have to presume that the Legislature did a useless thing in passing the paragraph dealing with the bond required in Section 13a. The only condition of the bond required by that section is 'the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this act,' while one of the conditions of the bond required in Section 19 is that the licensee 'will not violate any of the provisions of this act.' In other words, the conditions of the bond, as contended by respondents, could easily have been covered by Section 19, and the requirements set forth in Section 13a would have been unnecessary. The Legislature enacted

March 27, 1943

both Sections 13a and 19 in one bill and it should not be said that the Legislature intended that the two sections of the act should mean one and the same thing. Cohn et al. v. St. Louis, I. M. & S. Railroad Co., 151 Mo. App. 661, 133 S. W. 59."

CONCLUSION

It is, therefore, the opinion of this department that the Missouri Real Estate Commission, after holding a hearing, may suspend the license of a licensee indicted by Federal authorities on serious real estate charges, even though they have not been convicted of the charges.

It is further the opinion of this department that if the license of the licensee is suspended, or revoked, by the Commission, he may appeal to the circuit court of the county in which the hearing was had, or where the applicant resides, to have the proceedings reviewed on a writ of certiorari.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

REAL ESTATE COMMISSION:

Cannot demand money put in escrow
on guaranteed first mortgages.

April 24, 1943

5-5



Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion,
under date of April 21, 1943, which reads as follows:

"May the Commission have an opinion on
the following.

"More than one licensee in the metro-
politan areas are advertising in classi-
fied advertisements for sale 'Guaranteed
First Mortgages'.

"Has the Commission the power and au-
thority to summons for hearings such
parties advertising these Guaranteed
First Mortgages and make inquiry as to
what the Guarantee consists of or if
it be possible to have them change the
advertisement to state to what extent
the Guarantee covers.

"The St. Louis Real Estate Board has
adopted a requirement that if any Real-
tor advertises Guaranteed First Mortgages
that he must deposit with some responsible
escrowee the sufficient amount to cover
the guarantee. Would it be possible for
this Commission to adopt the same rule
to protect the General public."

Mr. J. W. Hobbs

(2)

April 24, 1943

In the above request you state that several licensees are advertising in classified advertisements for sale of "Guaranteed First Mortgages." The word "guaranty" is defined in *Border Nat. Bank of Eagle Pass, Tex., v. American Nat. Bank of San Francisco, Cal.*, 282 F. (Circuit Court of Appeals, Fifth Circuit) 73, 1. c. 77, as follows:

"A guaranty is a promise to answer for the payment of some debt, or the performance of some obligation, in case of the default of another person, who is in the first instance liable for such payment or performance. * * * * *

Also in the case of *Kelly-Springfield Tire Co. v. Hamilton et al*, 91 S. W. (2d) (Mo. App.) 193, 1. c. 195, the word was defined as follows:

"A guaranty is a collateral agreement for the performance of the undertaking of another. In other words, guaranty is a separate contract which imposes different responsibilities than those imposed in the contract to which it is collateral."

In other words, guaranteed first mortgages are mortgages that are covered by separate agreement which binds the guarantor to assume the performance of the undertaking of another.

In your request you also inquire:

"Has the Commission the power and authority to summons for hearings such parties advertising these Guaranteed First Mortgages and make inquiry as to what the Guarantee consists of or if it be possible to have them change the advertisement to state to what extent the Guarantee covers?"

April 24, 1943

As set out above, the guaranty may be only the personal guaranty of a guarantor that if the first mortgage is not paid when due he will pay the same. There is no false representation until he has failed to pay the amount of the first mortgage, upon the failure of the maker thereof to pay same when it becomes due. Of course, under the authorities set out in Section 10, par. (a) of the Missouri Real Estate Commission Act, the Commission may, upon its own motion, investigate the business transactions of licensees. Section 10, par. (a) of this Act, (Laws of Missouri, 1941, page 428) reads as follows:

"Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others."

Under par. (a), in order to revoke, or suspend, any license the licensee must make substantial misrepresentations or false promises in the conduct of his business. The fact that he guarantees the payment is not a substantial misrepresentation unless he refuses to pay the mortgage under his guaranty when the same is not paid under the terms of the mortgage or deed of trust. In order to hold that the licensee is guilty of making substantial misrepresentations, or false promises, the fraud must be shown either by a concealment of certain facts or actual misrepresentation. It was so held in the case of Klika v. Albert Wenzlick Real Estate Co. et al., 150 S. W. (2d) 18, par. 6, where the court said:

" * * * * It has also been held that fraud may be shown by concealment with intent to defraud, as well as by misrepresentation, if such concealment is material in the transaction by inducing one to act to his loss. Williams v. Hall, Mo. App., 261 S. W. 938, 940."

We find no authorization which would allow the Commission to cause the sellers of guaranteed first mortgages to change the advertisement in order that it would show to what extent the guaranty covers. It is true that under Section 4 of the Missouri Real Estate Commission Act the

following authority is granted:

" * * * Said commission may do all things necessary and convenient for carrying into effect the provisions of this act, and may from time to time promulgate necessary rules and regulations compatible with the provisions of this act. * * * * *"

We find no provision which would allow the Real Estate Commission to make a rule and regulation as to the mode and method of inserting advertisements. In your request you also state that the St. Louis Real Estate Board has adopted a requirement that if any realtor advertises, "Guaranteed First Mortgages" he must first place in escrow with some responsible depository a sufficient amount to cover the guaranty. This is purely a private contract between the realtor and the St. Louis Real Estate Board, and, under its charter and by-laws it is probably provided that the members should follow the rules and regulations as set out by the St. Louis Real Estate Board. Such is not the case under our statutory law, and it would not be possible for the Missouri Real Estate Commission to adopt the same rule to protect the general public.

CONCLUSION

It is, therefore, the opinion of this department, that the Commission has the power and authority to summons for hearing parties advertising, "Guaranteed First Mortgages" and make inquiry as to what the guaranty consists of, but it is not possible for the Missouri Real Estate Commission to have them change the advertisement so as to state to what extent the guaranty covers.

It is further the opinion of this department, that if any licensee advertises, "Guaranteed First Mortgages" the Missouri Real Estate Commission has no authority to order him to place in escrow with some responsible depository a

Mr. J. W. Hobbs

(5)

April 24, 1943

sufficient amount to cover his guaranty.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

REAL ESTATE COMMISSION: To collect commission licensee must have license at the time he was employed to sell real estate.

April 26, 1943



Mr. J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of April 21, 1943, in which you request an opinion as follows:

"This question has been put to the Commission. Will you give us your opinion on it?

"Does the obtaining of a license 10 days or two weeks after a sale is made entitle the plaintiff to maintain a suit in court for a commission? The particular plaintiff in question did not take out a license in 1942 and about two weeks after the sale was made he applied and was issued a license in 1943."

We are assuming that the plaintiff who has filed his suit, as set out in your request, either seeks to recover on an implied or express contract for his commission as a licensee.

Section 16 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 431, reads as follows:

"No person, copartnership, corporation or association engaged within this state in the business or acting in the capacity of a real estate broker or real estate salesman shall bring or maintain an action in any court in this state for the

recovery of compensation for services rendered in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person, copartnership, corporation, or association was a licensed real estate broker or salesman at the time when the alleged cause of action arose."

This section specifically states:

" * * * without alleging and proving that such person, copartnership, corporation, or association was a licensed real estate broker or salesman at the time when the alleged cause of action arose."

In your request you state that he was not a licensee until two weeks after the sale was made, which may mean that the contract for commission was entered into previous to the time of the sale.

The authority to pass laws is vested in the legislature under Section 1, Article IV of the Constitution of Missouri, so long as it is not restrained under Section 53, Article IV of the Constitution. Section 1 of Article IV of the Constitution of Missouri reads as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

Section 16 of the Missouri Real Estate Act, supra, is not a violation of Section 53, Article IV of the Constitution of Missouri, which prohibits the enactment of special laws, and is not restricted or prohibited by any other section of the Constitution of Missouri.

In construing a statute the court should consider the intent and the purpose of the act, as enacted by the legislature. (Artophone Corp. v. Coale, 133 S. W. (2d) 343, 345

Mo. 344 and State ex rel McKittrick v. Carolene Products Co., 144 S. W. (2d) 153, 346 Mo. 1049.)

The Real Estate Act as enacted by the legislature shows the intent and purpose of the legislature to grant licenses to persons who can qualify under that section and are competent to transact business in such a manner so as to safeguard the interests of persons who they represent. Section 7 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 427, reads as follows:

"A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

Under Section 16, supra, the cause of action can only be sustained when the petition alleges, and it is proven that the plaintiff was a licensee at the time the cause of action arose. Under the facts in your request the plaintiff was not a licensee until about two weeks after the sale, and probably longer after the contract of employment for the commission was made.

At the time the implied or express contract was made for the payment of a commission he was not a licensee and such contract was void as being in violation of the statute, that is Section 16, supra.

We are presuming that the plaintiff impliedly represented himself as a licensee and in such a case the contract for commission was void, and is unenforceable. It was so held in the case of Clair v. American Bankers Ins. Co., 137 S. W. (2d) 969, pars. 1-3, where the court said:

" * * * The so-called sales and assumption agreement was not enforceable against either party to it for the reason it was not effective until approved, as required by section 5731, supra. The law will not

uphold a contract made in contravention of statutory provisions. Saunders v. Union Central Life Ins. Co., 212 Mo. App. 186, 253 S. W. 177; Gooch v. Metropolitan Life Ins. Co., 333 Mo. 191, 61 S. W. 2d 704; Miller v. Bowen Coal & Mining Co., Mo. App., 40 S. W. 2d 485."

Also, in the case of Northcutt v. McKibben, 159 S. W. (2d) 699, pars. 7-10, the court said:

" * * * The law will not uphold a contract made in contravention of statutory provisions. * * * * *"

In the case of Massie v. Cottonwood School District, No. 36, of Nodaway County, (Kansas City Court of Appeals), 70 S. W. (2d) 1108, par. 1, the court said:

"The action being for damages because of an alleged breach of a claimed contract, of course the proof must establish a legal, enforceable contract. * *"

If the plaintiff in this action described in your request claimed and made representations to the defendant that he was a licensed real estate agent, when in truth and fact he was not licensed at the time he entered into a contract for the commission he has committed a fraud, and the contract would be unenforceable. It was so held in the case of Taggart v. School Dist. No. 52, Carroll County, 96 S. W. (2d) 335, par. 3-4, where the court said:

" * * * In the early case of Armstrong v. Winfrey, 61 Mo. 354, 359, this court said: 'It is a familiar doctrine that no valid contract can arise out of a fraud, and that any action brought upon a supposed contract which is shown to have arisen from fraud, may be successfully resisted. Fraud avoids all contracts, where it can be shown that if it had not been employed the contract would not have been made.' It

April 26, 1943

is clear that plaintiff's written contractual representation that she was not married was a fraud upon defendant and of such a nature as to affect defendant's willingness to contract with plaintiff. Courts should not and do not aid fraud-feasors by enforcing contractual obligations procured by means of fraudulent representations. See Guilford School Township v. Roberts, 28 Ind. App. 355, 62 N. E. 711; Security Sav. Bank v. Kellems, supra."

CONCLUSION

It is, therefore, the opinion of this department that the obtaining of a license ten days or two weeks after a sale of real estate is made will not entitle the plaintiff to maintain a suit in court for his commission agreed upon with the defendant who was the owner of the real estate.

It is further the opinion of this department that in order for the plaintiff to recover compensation for services rendered in the sale of real estate he must allege in his petition, and prove, that he was a licensed real estate broker or salesman at the time the alleged cause of action arose.

Respectfully submitted

APPROVED BY:

W. J. BURKE
Assistant Attorney General

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

EFFECTIVE DATE: House Bills 20 and 45.

Marriage Laws:

May 17, 1943

5-22



Hon. W. A. Holloway
Chief Clerk
Office of State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holloway:

Under date of April 15, 1943, you wrote this office requesting an opinion as follows:

"House Bill No. 20 and House Bill No. 45, both pertaining to requirements of persons desiring to be married have been signed by Governor Donnell and will therefore, we presume, become effective in ninety days after having been signed by him. The enactment into law of these two bills will require a revision of the application forms now being used by persons applying for a license to marry, and perhaps will also require a change in the license itself.

"We therefore respectfully request, first: the time when these two bills will become effective. Second: a proper uniform form to be used by Recorders throughout the State of Missouri that will fully comply with the requirements of the law, and third, a proper marriage license to be issued under the provisions of the new law.

"Due to the shortness of time that may be involved in getting this new law into effect, we shall appreciate this information at your earliest opportunity."

At the time of the receipt of your request, there was in the office a prior request concerning the effective date of House Bill 20, enacted by the 62th General Assembly. A reply

Hon. W. A. Holloway

- 2 -

May 17, 1943

to your request has been delayed pending the completion of that opinion. The opinion has now been completed and a copy is herewith enclosed. It is directed to A. A. Hoff, Circuit Clerk and ex officio Recorder of Deeds of Cooper County, and was written by L. I. Morris, Assistant Attorney General.

In regard to House Bill 45, the same principles of law will apply and the Bill will become law in the same length of time after it was signed by the Governor that House Bill 20 will become law. However, the provisions of House Bill 45 will not go into operation until January 1, 1944, by the provisions of the Section 3364-D of the Bill, which is as follows:

"This Act shall become effective on January 1, 1944, and shall be in full force and effect thereafter."

Attached hereto is a revised form of application for marriage license in response to your request. There is no reason why the form of license should be revised.

Respectfully submitted,

W. O. Jackson
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

REAL ESTATE COMMISSION: Licensed real estate agent cannot pay unlicensed broker commissions to secure prospective customers for money loans secured by real estate.

May 26, 1943



Honorable J. W. Hobbs
Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Mr. Hobbs:

This is in reply to your request for an official opinion, under date of May 24, 1943, which request reads as follows:

"May the Commission request an opinion on the following matters?

"Do persons, banks, trust companies, building and loan associations, insurance companies, farm loan associations and other associations, or corporations, who loan money for others, who hold a Missouri Real Estate license, violate the Missouri Real Estate Commission Act when they actually pay commission to brokers who hold no Missouri Real Estate Commission license, where the loan is secured by a mortgage, or deed of trust upon real estate and also where no commission is paid direct to said persons who sometimes agree to assume the costs of title examination?"

The sections of the Missouri Real Estate Commission Act which are applicable to this question are sections 3 and 15, Laws of Missouri, 1941, page 425.

Section 3 of the Missouri Real Estate Act partially reads as follows:

"A real estate broker is any person, copartnership association or corporation, foreign or domestic, * * * * *

May 26, 1943

who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. * * * * This act shall not apply to * * * * any bank, trust company, building and loan association, insurance company or farm-loan association, organized under the laws of this state or of the United States when engaged in the transaction of business on its own behalf and not for others; nor shall this act apply to any person who does not advertise or hold himself out to the public as a licensed real estate broker or dealer and who might, occasionally, buy or offer to buy, or sell or offer to sell, or rent or lease or offer to rent or lease any real estate, or to loan or offer to loan money secured by real estate."

Under the above two sections there is no question but that a money lender who loans money of others, under a Missouri Real Estate license, and who pays commissions direct to brokers who obtain prospective customers for the loan of money, or for sales of loans secured by a mortgage or deed of trust upon real estate, which have already been consummated, violates the Act when the broker does not have a Missouri Real Estate Commission license.

The latter part of your request in reference to the assuming of the costs of title examination is a question of fact in each individual case. If the money lender is loaning the money of others direct to the owner of the real estate, the money lender is not illegally assuming the cost of title examination, for the reason that it is for his client's protection. It is true that some persons and associations in the city of St. Louis who are loaning money on real estate require written application for loans in which the borrower agrees to pay the costs of title examination and other expenses connected with the loan. If the money lender is selling a mortgage or deed of trust which is secured by real estate and which deed of trust or mortgage has been made and the money lender decides to sell the loan through a broker who has no real estate license, it is a question of fact whether or not he is attempting to pay indirectly the unlicensed broker when he agrees to pay the costs of title examina-

Honorable J. W. Hobbs

(3)

May 26, 1943

tion of the loan already made.

The Act prohibits a licensed real estate broker from paying any part of a fee, commission, or other compensation to any person for any service rendered by such person, which person is not a licensed real estate salesman, in negotiating any loan upon any real estate.

It is true that when the costs of title examination and other expenses are assumed by the real estate agent, he may, or may not, be attempting to illegally pay a commission to an unlicensed broker. It all becomes a question of fact in each individual case and the licensed real estate dealer cannot indirectly do anything that is directly forbidden by the Act.

CONCLUSION

It is, therefore, the opinion of this department that persons, banks, trust companies, building and loan associations, insurance companies, farm loan associations and other associations or corporations, who loan money for others, and who hold a Missouri Real Estate license, violate the Act when they actually pay commissions directly to a broker who holds no Missouri Real Estate license.

It is further the opinion of this department that it is a question of fact in each individual case, if the licensed broker assumes the costs of title examinations and other expenses connected with the loan of money on real estate, where the broker who handles the transaction is not a licensed real estate broker as to whether or not he is indirectly attempting to violate the Real Estate Commission Act.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

REAL ESTATE
COMMISSION:

Licensee may pay non-resident who regularly
engages in the brokerage business.

June 7, 1943



Mr. J. W. Hobbs
Executive Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of June 2, 1943, in which you request an opinion as follows:

"May we have the opinion of your office on Section 15 of the License Law.

"Can a licensee pay a commission to anyone outside the State of Missouri who is regularly in the brokerage business and who sends the licensee a client?

"The first part of Section 15 prohibits a broker from splitting a commission unless it is with a licensed broker. Is there an exception in the case of persons regularly engaged in the brokerage business but who are doing business outside of the State of Missouri?

"Does a non-resident who is regularly engaged in the brokerage business in another state have to apply and receive a license from the Missouri Real Estate Commission before he can participate in any part of a fee or receive same from a Missouri Licensee?"

Section 15 of the Missouri Real Estate Commission Act, Laws of Missouri, 1941, page 430, reads as follows:

"No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside of the State of Missouri."

Under the above section there are only three instances in which a real estate broker can pay any part of a fee, commission, or other compensation to any person for services rendered by such person to the broker in real estate or loan negotiations; First, the payee must be a person who is licensed real estate salesman, regularly associated with the payor; second, the payee must be a licensed real estate broker; and third the payee must be a person regularly engaged in the real estate brokerage business outside of the State of Missouri.

Ordinarily the word "or" in a statute is used as a disjunctive and marks the alternative generally corresponding to "either." It was so held in the case of *Dodd v. Independence Stove & Furnace Co.*, 51 S. W. (2d) 114, 1. c. 118, where the court said:

"The construction of the statute contended for by appellant would make 'or' mean substantially, 'that is,' in other words 'noxious, that is to say, poisonous' dusts, thus making the descriptive adjectives 'noxious' and 'poisonous' in effect synonymous. While the word 'or' may sometimes be so used, its ordinary use is as a disjunctive 'that marks an alternative generally corresponding to 'either,' as 'either this or that.'"

46 C. J. 1124, Sec. 1. See, also; State v. Combs (Mo. Sup.) 273 S. W. 1037, 1039; Case Threshing Machine Co. v. Watson, 122 Tenn. 148, 122 S. W. 86, 974. Appellant's construction would render one of said descriptive adjectives practically superfluous, and the Legislature will not be presumed to have intended using superfluous or meaningless words in a statute."

Under the above holding the licensed real estate broker who is the payor can only pay payee's part of his commission who can qualify under either of the three definitions above set out.

Section 15 does not set out that the person regularly engaged in the real estate brokerage business outside of the state of Missouri should be a resident of the state where he is regularly engaged in the brokerage business.

Courts cannot interpolate in a statute where the omission is not plainly indicated. It was so held in the case of Betz v. Columbia Telephone Co., 24 S. W. (2d) 224, 1. c. 228, 224 Mo. App. 1004, where the court said:

"* * * * Intent of the Legislature must be ascertained and given effect as expressed in the statute. Rogers Foundry Co. v. Squires, 221 Mo. App. 17, 297 S. W. 470. Courts can not interpolate in a statute where omission is not plainly indicated. State ex rel. Cobb v. Thompson (Mo. Sup.) 5 S. W. (2d) 57. To get at the true meaning of the language in a statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made. * * * * *"

June 7, 1943

Under the above holding it is also shown that Section 15 cannot be construed to the effect that the person regularly engaged in the brokerage business must be a resident of this state or a resident of the state in which he is regularly engaged in the real estate brokerage business.

CONCLUSION

It is, therefore, the opinion of this department that a licensee under the Missouri Real Estate Commission Act in this state can pay a commission or part of a commission to anyone outside the state of Missouri who is regularly engaged in the brokerage business, and who sends the licensee a client.

It is further the opinion of this department that a non-resident who is regularly engaged in the brokerage business in another state need not apply and receive a license from the Missouri Real Estate Commission before he can participate in any part of a fee or receive the same from a Missouri licensee.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General

WJB:RW

REAL ESTATE COMMISSION: Fees of unused license cannot be refunded; a person who holds himself out as a real estate dealer in this state must qualify and apply for a license.

June 10, 1943



Mr. J. W. Hobbs
Executive Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Sir:

Your request for an opinion, dated June 8th, 1943, in reference to changes of types of licenses, and real estate brokers who deal exclusively in Kansas property, has been received.

I

Your first question reads as follows:

"We have several types of licenses, namely, Brokers, Salesmen, Corporations, Co-partnership, Associations and Members of Corporations, Co-partnerships and Associations, and if a person applies and is issued one type of license in a calendar year and later in the year desires to apply and be issued a different type of license can the fee paid for the first license apply to the cost of fee for the second license desired, which would be a different type of license? Also should the licensee return his certificate and pocket card of the first license issued when applying for a different type of license."

The fees and terms of licenses are set out in Section 9 of the Missouri Real Estate Act, Laws of Missouri, 1941, page 428. This section reads as follows:

"The annual fee for a real estate broker's license shall be \$5.00. When issued to a copartnership, association or corporation, there shall be an additional annual fee of \$2.00 for each member or officer who actively participates in the real estate business. The annual fee for such real estate salesman's license shall be \$2.50. Every license granted under this act and every renewal thereof shall expire on the 31st day of December in the year in which said license is issued. The commission shall issue a new license for each ensuing year in the absence of any reason or condition which might warrant the refusal of the granting of a license, upon receipt of the written application of the applicant and the renewal fee herein required."

We find no statutory authority in this section which would authorize the Real Estate Board in applying the unused balance of a license fee from one form of license as a payment on another form of license as therein set out. The rule as to the refunding of license fees is set out in 37 Corpus Juris, Sec. 130, page 255, which reads as follows:

"Refunding or Recovering Fees Paid--1. In General. Where the fee or tax which has been paid was not illegal or unauthorized, it cannot be recovered back, irrespective of whether its payment was voluntary or involuntary, and although the method of its collection was irregular.

"Termination of license. The unearned portion of the money paid for a license

may be recovered by the licensee, where the license has become inoperative by acts or circumstances over which he has no control and without his volition, as where he is deprived of his license by a statute or ordinance which prohibits the occupation for which the license was obtained, and in some jurisdictions this rule is prescribed by statute. But this rule does not apply where the license becomes ineffective through the licensee's act in voluntarily abandoning the only place where it could be lawfully exercised, or, in the absence of statute, in voluntarily surrendering the license, or where the license has been rightfully and properly revoked or canceled.

"A sum deposited with an application for a license may be recovered on the failure or refusal to issue a license, without any fault on the part of the applicant."

The Supreme Court of this state has followed that rule in reference to the refunding of license fees paid by liquor dealers, which is synonymous to a license fee paid by brokers and salesmen under the Real Estate Act.

Following this rule the Supreme Court, in the case of *Neumer v. Jackson County*, 197 S. W. 139, Par. 3, said:

"The only other theory which might be urged as a basis of recovery is that a dramshop licensee upon the surrender of his license is entitled to a rebate for the unexpired portion of the license. It would appear, however, that the great weight of authority is to the effect that a recovery cannot be had under those conditions, in the absence of a statute so authorizing.

"The rule here applicable is stated in 15 R.C.L. 315, as follows:

"It seems to be well settled that ordinarily a licensee does not, on the voluntary surrender of his license, become entitled to the return of the licensee fee, in proportion to the unexpired term, in the absence of statutory enactment to the contrary."

"To the same effect are the following authorities: Joyce on Intoxicating Liquors, Sec. 330; 1 Woollen & Thornton on the Law of Intoxicating Liquors, Sec. 500; case note in 16 L.R.A. (N.S.) loc. cit. 515, and cases therein cited."

Since we are holding that the fee of one license, which is unused cannot be applied to a second license to be applied for, the Real Estate Board would have no authority to ask the licensee to return his certificate and pocket card of the first license.

CONCLUSION.

It is, therefore, the opinion of this department that if a person applies for and is issued one type of license in a calendar year and later in the year desires to apply and be issued a different type of license the fee paid for the first license cannot be applied to the cost of the fee for the second license which would be a different type of license.

It is further the opinion of this department that the Real Estate Board has no authority, by statute or otherwise, to compel a licensee to return his certificate and pocket card of the first license issued when applying for a different type of license.

II

Your second question reads as follows:

"Also may we request an opinion in regard to a person that resides in Kansas City, Missouri, and has an office in that City and sells property in the State of Kansas, but does not sell Missouri property. Would such a person have to qualify and apply for a Missouri license?"

Section 1 of the Missouri Real Estate Act, Laws of Missouri, 1941, reads as follows (page 425):

"After January 1, 1942, it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

Section 3 of the same Act, page 425, partially reads as follows:

"A real estate broker is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a LICENSED real estate broker or dealer and who for a compensation or valuable consideration, as a whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers

to exchange the real estate of others; or who leases or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property. A real estate salesman, within the meaning of this act, is any person, who for a compensation, or valuable consideration becomes associated, either directly or indirectly with a real estate broker to do any of the things above mentioned, as a whole or partial vocation. * * * * *

In setting out the definition of who should be required to apply for licenses as a real estate broker or a real estate salesman, no mention is made as to the location of the property involved in the matter, but they merely say, and refer all through Section 3, as to the dealing in real estate of others and negotiating loans of money for others. Since in your request you state that the person who resides in Kansas City, Missouri, and has an office in that city, and sells property in the State of Kansas, is holding himself out in the State of Missouri as a real estate dealer, then, under Section 3, he should be required to qualify and apply for a Missouri license.

CONCLUSION.

It is, therefore, the opinion of this department that, if a person resides in Kansas City, Missouri, and has an office in that city, where he holds himself out as a real estate dealer, but sells property in the State of Kansas, and does not sell Missouri property, he should qualify and apply for a Missouri Real Estate license:

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

WJB:CP

REAL ESTATE COMMISSION: No prohibition against broker paying directly or indirectly to borrower cost of making loan, under Sec. 15, p. 424 et seq., Laws of Mo., 1941.

August 5, 1943

81
FILED
41

Mr. J. W. Hobbs, Executive Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Mr. Hobbs:

This is to acknowledge receipt of a letter of recent date directed to you by Mr. E. D. Ruth, Jr., Chairman of the Missouri Real Estate Commission, in which he requested the opinion of this Department on a matter therein propounded. The question as set forth in his letter is as follows:

"Can licensed Real Estate Brokers, who have always been in the habit of requiring the borrower to pay for the examination of title, recording fees, acknowledgements, surveys, etc., and which practice is the general custom of the locality in which the loan is being made, as an inducement to obtain the loan, pay a cash premium to the borrower or in lieu thereof, can they assume a substantial part or all of the cost of making a loan, such as title examination, recording, surveys and so forth."

"It is the contention of some of our licensed brokers that if this practice is permitted among licensed real estate brokers, it enables a licensed broker, doing such a thing, to indirectly pay a fee or a commission to the borrower which he cannot do directly."

August 5, 1943

Your question, in our opinion, may be answered by a correct interpretation of the meaning of Section 15 of the act created by the Legislature, known as the "Missouri Real Estate Commission Act" and found at page 424 et seq., Laws of Missouri, 1941, which section 15 provides as follows:

"No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside of the State of Missouri."

We find nothing in this section which would prevent a duly licensed real estate broker from assuming a substantial part or all of the costs of making a loan, such as title examination, recording and surveys for a legitimate borrower for whom the broker is negotiating a loan, or the broker may in lieu of the assumption of these costs pay to the borrower a cash premium in the way of a reduction of the commission. In other words, the licensed broker may charge whatever sum he desires to the borrower for making a loan. We think the purpose of Section 15 was to prevent a broker from having runners or other persons without licenses find borrowers for the broker and the broker splitting his commission with such unlicensed persons. Of course, under this act, under Section 15, a licensed real estate broker is permitted to pay any part of a fee, commission or other compensation to another person who "is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in real estate brokerage business outside of the State of Missouri."

August 5, 1943

Conclusion

It is, therefore, our opinion that a licensed real estate broker may assume a substantial part or all of the costs of making a loan, such as title examination, recording, surveys etc., or remit to the legitimate borrower all or any part of his commission for negotiating a loan, without violating the Missouri Real Estate Commission Act.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKEETTRICK
Attorney-General

CRH:EG

OFFICERS: Compensation of officers cannot be increased during their term of office.

August 14, 1943



Honorable W. A. Holloway
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Mr. Holloway:

The Attorney-General wishes to acknowledge receipt of your letter of August 13, 1943, in which you request an opinion of this department. Your request, omitting caption and signature, is as follows:

"House Bill No. 542 has been passed by the General Assembly and signed by the Governor on August 4, 1943.

"This bill amends Section 14030, R. S. Missouri, 1939, by changing the compensation of the Assessor from four cents to ten cents for each individual statistical listing of land acreage filed with the Commissioner of Agriculture. The ten cents to be paid as the four cents has been previously paid by the State and County.

"Bearing in mind that Township Assessors are elected in the Spring for terms of two years each, and that County Assessors are elected in the General Election for terms of four years each; the point has been raised with this office and we therefore desire your opinion as to when the Assessors will be entitled to receive their additional compensation provided for in House Bill 542."

During the session of the 62nd General Assembly, held in Jefferson City, beginning in January, 1943, there was a

Concurrent Senate Resolution presented (Resolution No. 2) which recommended and resolved that an amendment to the Constitution be made declaring that all laws passed by the General Assembly should become effective ninety days after the signing of such laws by the Governor of this State. This Resolution was presented in the form of an Amendment to the Constitution on April 6, 1943, to the electorate, and the same passed. Said Amendment provides as follows:

"Amendment repealing Section 36, Article IV, Missouri Constitution, and enacting new section providing effective date of laws of General Assembly, except appropriation acts and emergency acts.

"JOINT AND CONCURRENT RESOLUTION submitting to the qualified voters of the state of Missouri an amendment repealing Section 36 of Article IV of the Constitution of Missouri and enacting in lieu thereof a new section relating to the same subject establishing the effective date of laws, to be known as Section 36 of Article IV.

"Be it resolved by the Senate, the House of Representatives concurring therein:

"That at a special election to be called by the Governor for that purpose, or at the general election, to be held in this state on the first Tuesday after the first Monday of November in the year 1944, there shall be submitted to the qualified voters of this state for adoption or rejection a proposition to repeal Section 36 of Article IV of the Constitution of Missouri relating to the effective date of laws, and to enact in lieu thereof a new section relating to the same subject matter to be known as Section 36 of Article IV and to read as follows:

Section 36. No law passed by the General Assembly, except appropriation acts, shall take effect or go into force until ninety days after enactment and approval thereof as otherwise provided by this Article, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

It will be seen from a study of the above constitutional amendment that a law passed by the General Assembly, except appropriation acts, cannot take effect until ninety days after its enactment and approval by the Governor. This appears to be what might be termed a "negative provision," and does not state when an act shall go into effect.

In view of that fact I also wish to cite you to Section 659, R. S. Mo., 1939, which in part provides the following:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

*****"

This statute provides that a bill shall go into effect ninety days after the adjournment of the Legislature. This is a positive provision and consequently, since it was not repealed by the Constitution nor in conflict with the constitutional provision cited above, it is our opinion that a bill such as House Bill 542 which does not include an emergency clause and which does not provide that it shall go into effect ninety days after its passage and approval, will take effect under the provisions of Section 659, R. S. Mo. 1939, aforesaid, ninety days after the adjournment of the session of the Legislature during which it has been passed.

I might further say that another reason for this view is that at the last General Assembly there was introduced in the House of Representatives, House Bill No. 652, which was intended to remedy this situation and in repealing Section 659, aforesaid, was to provide that a law passed by the General Assembly should take effect ninety days after its passage and approval by the Governor. However, this bill failed to pass.

In view of the foregoing it is our opinion that House Bill No. 542 will take effect ninety days from the adjournment of the session of the Sixty-second General Assembly, which at this time we are unable to compute.

Your question deals primarily, however, with the effective date of House Bill No. 542 with regard to township assessors and county assessors who are at the present time holding office and whether or not these officers can receive an increase in compensation under this bill or whether, as far as their offices are concerned, this bill will not effect them until the next county and township assessors are elected.

The term of office and the manner in which the township assessors are elected are set out in Sections 13944 and 13945, R. S. Mo. 1939. These sections provide as follows:

"(13944) The citizens of the several townships in all counties having adopted the township organization law of this state, who are qualified by the Constitution and laws of this state to vote at general elections, shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers and such other officers and transacting such other business as may be necessary."

"(13945) There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, and one township clerk, who shall

be ex officio township assessor, one constable, two members of the board, and two justices of the peace: Provided, the same persons may be elected members of the board and justices of the peace, at the same election, and hold both offices; also the same person may be elected constable and collector at the same election and hold both offices at the same time, by taking the proper oath of each office and giving the bond required by law."

As can be seen from a study of these two sections of the statutes, the township assessor shall be elected every two years on the last Tuesday in March, at which time all of the officers of the township are selected.

As far as county assessors are concerned, we find the regulation as to their election in Section 10943, R. S. Mo. 1939, which prescribes the following:

"At the general election in the year one thousand nine hundred and every four years thereafter, there shall be elected by the qualified voters of the several counties in this state a county assessor, who shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that this section shall not apply to the city of St. Louis."

As can be seen from a study of the above section, we find that the county assessors are elected each four years, during the general election.

We further wish to call attention to the fact that Article XIV, Section 8, of the Constitution of Missouri, provides that no officer shall have his salary or compensation increased during his term of office. This section of the Constitution provides as follows:

"The compensation or fees of no State, county or municipal officer shall be

increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

The only manner in which an officer may receive additional compensation to the compensation prescribed by statute during his term of office, is that he be given additional duties by the Legislature and for such additional duties he shall receive and may receive an additional amount to that received at the beginning of his term. See *Dennenny v. Silvey*, 302 Mo. 665, 259 S. W. 422. Page 2, on line 25 of House Bill 542, we find the following:

"The assessor shall receive for such additional assessment service as required in this section an additional fee of ten cents for each individual statistical listing of land acreage and other accompanying agricultural statistics filed by him with the commissioner of agriculture, which additional fee shall be paid out of the general revenue fund of the state * * *."

By reading the above provision it might be thought that in view of the fact there is mentioned in this act an additional assessment service, that the county assessor and the township assessor might be permitted to receive the additional compensation provided by this bill in view of the fact that there is an additional service which they are required to perform. However, by a study of Section 14030, R. S. Mo. 1939, we find that the very same wording was in that section of the statute and if there is any additional service to be had that such duty was provided for by the statute of 1939 and not by House Bill 542. Consequently, as far as the officers involved are concerned, they will be required to perform the same duties as they were required to perform at the time of their election, the only difference being that instead of receiving four cents for each individual statistical listing that they shall receive ten cents. In view of the fact that this is in conflict with Article XIV, Section 8, of the Constitution of Missouri, it is the opinion

August 14, 1943

of this Department that the officers now holding these particular offices in the State of Missouri will not be entitled to receive the additional compensation provided by House Bill No. 542 during the term of the office which they now hold.

Conclusion

Therefore, it is the opinion of this Department that the present incumbents of the offices of township assessor and county assessor in the State of Missouri shall not be entitled to the additional compensation provided by House Bill No. 542, in view of the fact that they have no right to any additional compensation during their present term of office and that such additional compensation cannot be forthcoming until the next term of these offices.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

PROBATE JUDGES: Should collect fees under present law until House Committee Substitute for Senate Bill 4 becomes effective.

September 20, 1943



Hon. Paul S. Hollenbeck
Judge of the Probate Court
Maries County
Vienna, Missouri

Dear Judge Hollenbeck:

Under date of September 11, 1943, you wrote this office requesting an opinion as follows:

"Am in receipt of your letter of September 10, 1943, in which you enclosed an opinion of Hon. Leo A. Politte in regard to Senate Bill No. 4. This clarifies several points of the bill but would like further light on one point.

"On page 4, in paragraph 5, the opinion states that after the effective date of the bill all accountable fees collected during such month must be paid over to the county. My question is this: Can a probate judge collect and retain all fees earned and accrued in his office before November 22nd, 1943 and retain them? In other words, can a judge collect earned fees at this time and retain them instead of waiting until a later date (after the effective date of the bill) and collecting such fees earned prior to said effective date and having to pay such fees over to the county?

"I assume, of course, that in fees collected in the month of November, only such fees as are collected after the 22nd will have to be accounted for."

House Committee Substitute for Senate Bill No. 4 can have no effect until the date on which it becomes effective under the statutes and the Constitution. Your attention is directed to the following brief quotation from the case of *State ex rel. Bauer v. Edwards et al.*, 136 Mo. 360, 1. c. 368:

"The revised law, being the later, repealed such parts of the act of 1889 as were inconsistent with it. State ex rel. v. Heidorn, 74 Mo. 411. The act of 1889 provided for a joint assessment by the county and city assessors, and the revised law required the assessment made by the county assessor to be taken. These provisions are irreconcilably inconsistent and the former was repealed by the latter.

"But the repeal was not effected until the revised law went into effect, November 1, 1889. The act of 1889 was, therefore, in force from its approval, May 20, until its repeal November 1, 1889."

Your attention is also directed to the following quotation from the case of *State ex rel. Brunjes v. Bockelman*, 240 S. W. 209, 1. c. 212:

"The real issue in this case is to determine from what exact date such a statute speaks. In our judgment it speaks as of the date it becomes effective and not otherwise.

"In *Rice v. Ruddiman*, 10 Mich. loc. cit. 135, Christiancy, J., said:

"It is very clear the act did not take effect till 90 days after the end of the session. But we do not think the act was therefore void as to the election provided for. It took effect in May, 1859, and must be understood as beginning to speak at the moment when it

became a law, and not before. It must have the same construction as if passed on the day when it took effect and directed by a two-thirds vote to take immediate effect. "April next" must therefore be understood as April, 1860, being the next April after the act took effect. Any other construction leads to absurdity, and imputes to the Legislature the enactment of a farce under all the solemn forms of legislation.'

"The law discussed was passed February 4, 1859, and has not been passed with an emergency. Such a law became effective in 90 days.

"In *Price v. Hopkins*, 13 Mich. loc. cit. 327, Cooley, J., said:

"It was held in *Rice v. Ruddiman*, 10 Mich. 125, that a statute must be understood as beginning to speak the moment it takes effect, and not before; and this decision is in harmony with that in *Charles v. Lamberson*, 1 Clark (Iowa) 442, where a statute for the protection of homesteads, which made them liable for all debts contracted prior to its passage, was held to mean, prior to its taking effect, although that period was some time after its enactment.'

"Even notice cannot and will not be taken of such statutes until by their terms they become effective. *Price v. Hopkins*, supra; *Sammis v. Bennett*, 32 Fla. loc. cit. 460, 14 South, 90, 22 L. R. A. 48."

While the statutes under consideration in those cases were not salary acts, the same principles apply and the new law would not operate as a repeal of the old law until its effective date.

Hon. Paul S. Hollenbeck

-4-

Sept. 10, 1943.

Conclusion

Until House Committee Substitute for Senate Bill No. 4, enacted by the 62nd General Assembly, becomes effective, fees will be charged and collected when they become due by probate judges in accordance with the law in existence at this date.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WOJ:EG

COUNTY COLLECTOR: County not liable for erroneous publication
TAXATION: of notice of tax sale.

November 15, 1943

Mr. Ray Holmes, Clerk
County Court of Oregon County
Alton, Missouri



Dear Sir:

This will acknowledge receipt of your letter of November 3rd, 1943, requesting an opinion from this department, which reads as follows:

"Will you please advise whether the County is liable for costs of publications of lists of delinquent tax lands, in the following instance; The Collector of this County started his publication at such time that there would only be 4 days between the last insertion and the first Monday in November. Thereafter, after 2 weekly insertions, the Collector discovering this, the Collector inserted a notice in the paper to the effect that there would be no tax sales this year under said publication, after being advised that deeds executed upon such tax sales would not transfer title.

"Please advise if the County is liable for the costs of said publications, and if so whether the County has any remedy against the Collector for reimbursement for said costs."

Section 11126, R. S. Mo. 1939, leaves no doubt in one's mind as to the proper procedure to be followed in offering for sale delinquent tax lands, which, in detail and express terms, provides for each and every prerequisite to a valid

sale. The decisions in this state have repeatedly held that to constitute a valid sale there must be a strict compliance with the statutes relative to the procedure for offering such land for sale.

In *Beckwith v. Curd*, 347 Mo. 602, 148 S. W. (2d) 800, 1. c. 802, the court said:

"We think the rule is well established that when an administrative officer sells property at a tax sale, a strict compliance with the statutes is required. * * * * *

Also see *Comfort v. Ballingal*, 134 Mo. 281, 35 S. W. 609, 1. c. 612, wherein the court said:

"When the process of collecting taxes by the sale of lands for their nonpayment is a summary remedy, as in the case at bar, and the law requires that certain things be done by the officer making such a sale in connection therewith, nothing less than a strict compliance with such requirements will suffice, and, unless it appear that the law has been strictly complied with, the sale will be void.

* * * * *

"It would be a dangerous principle to adopt, that titles to land derived from tax sales may be sustained partly by record and partly by parol proof. The publication of notice of the tax sale, the certificate that such notice had been given, and filing the same in the office of the city auditor in the manner and time prescribed by law, were prerequisites to the validity of the tax deeds. And 'any neglect of the officer selling land for the nonpayment of taxes, which deprives the owner and bidders of the full information the law intended to give them, renders the sale invalid.' *Jarvis v. Silliman*, 21 Wis. 607."

In Lamar Township v. City of Lamar, 261 Mo. 171, 1. c. 189, the court held that officers are not general agents and their duties are usually prescribed by statute, the persons dealing with them do so with full knowledge of the law which limits their authority and that if the officers fail to follow their statutory duty public policy demands that the cestui que trust, which in this case would be the county, shall not suffer. It is stated in the following language:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

In view of the foregoing authorities the County Collector, in failing to follow the law as provided under Section 11126, supra, which requires a list of such delinquent lands and lots be published for three consecutive weeks, the last insertion to be at least fifteen days prior to the first Monday in November, did not in any manner bind the county for the expense of publication. Had such statute been strictly followed by the County Collector such expenses for newspaper publication would have been paid out of the County Treasury and taxed as part of the costs of the sale of such lands and lots.

It has been held that when a public officer under the law is required to perform a ministerial act and for some reason fails to perform such function, then if any difficulties occur he is personally liable to the person damaged.

In *Burton Machinery Co. v. Ruth*, 194 Mo. App. 194, 1. c. 197, the court said:

"It is well settled rule that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do the act, he is liable in damages at the suit of a person injured. In such cases a mistake as to his duty and an honest intention is no defense. (*Amy v. Supervisors*, 11 Wall. 136; *Ins. Co. v. Leland*, 90 Mo. 177, 2 S. W. 431; *Mechem on Officers*, sec. 664.)' (*Knox County v. Hunolt*, 110 Mo. 67, 74 and 75, 19 S. W. 828; *Steadly v. Stuckey*, 113 Mo. App. 582, 585, 87 S. W. 1014; *State ex rel. Wheeler v. Adams*, 101 Mo. App. 468, 471, 74 S. W. 497.)"

In *Smith v. Berryman*, 272 Mo. 365, 1. c. 374, the court said:

"The cases cited to us by learned counsel, as is so clearly pointed out by Judge REYNOLDS (*Smith v. Berryman*, 173 Mo. App. 1. c. 161), are not in point, and are readily to be distinguished from the situation confronting us. Those cases simply hold that an action will lie against an officer whose duty it is to perform, but who refuses to perform, a ministerial act. There can be no doubt upon this point, and no one would be so bold as to contend otherwise, especially in a case which does not call for the exercise of official discretion. If the rule were not so, no suit would lie against an officer upon his official bond by a citizen, injured by a failure to correctly or timely perform a ministerial duty."

The duty placed on the Collector, under Section 11126, supra, of publishing notice in newspapers, and the setting out of the time same shall be published, makes the Collector's performance nothing more than a ministerial act. It leaves no discretion whatsoever to the Collector, but he must follow strictly the provisions of said act.

CONCLUSION

It is, therefore, the opinion of this department that the order of publication is the result of a ministerial act and, since said publication was erroneous, under the statute there is no liability against the County for said publication.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

ARR:CAP

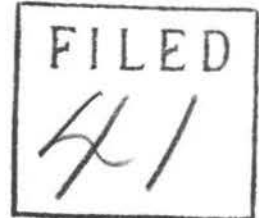
MISSOURI REAL ESTATE
COMMISSION ACT:
AUCTIONEER:

Auctioneer not required to obtain
license from Missouri Real Estate
Commission to sell real estate at
public sale.

November 18, 1943

Mr. J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

11/24



Dear Mr. Hobbs:

We have for attention your letter of November 12th,
requesting an official opinion from this department on
the question contained in your letter reading as follows:

"In many sections of the State auctioneers
are selling real estate sometimes along
with household furniture and other equip-
ment and many times the real estate by
itself, they of course charge the regular
auctioneer's fee or the real estate fee
for such services. Under our law wouldn't
the auctioneer have to apply and receive
a real estate license?"

You desire to know whether a regular auctioneer must
procure a license from the Missouri Real Estate Commission
before he is entitled to sell real estate either in con-
junction with household furniture or to sell real estate as
one sale.

The Missouri Real Estate Commission Act was enacted by
the General Assembly in 1941 and may be found at pages 424,
et seq., Laws of Missouri, 1941.

The first section of said Act provides:

"After January 1, 1942, it shall be unlaw-
ful for any person, copartnership, associa-
tion or corporation, foreign or domestic,

to act as a real estate broker or real estate salesman, or to advertise or assume to act as such without a license first procured from the Missouri Real Estate Commission."

Section 3 of said Act defines what is termed a real estate broker and the latter part of said section provides as follows:

"* * * nor shall this act apply to any person who does not advertise or hold himself out to the public as a licensed real estate broker or dealer and who might, occasionally, buy or offer to buy, or sell or offer to sell, or rent or lease or offer to rent or lease any real estate, or to loan or offer to loan money secured by real estate."

The business and profession of a public auctioneer has been recognized by the Laws of Missouri since 1825, where such recognition is found at page 160; and since that time auctioneers have been licensed to conduct the trade or business of public auctioneers.

Section 14912, R. S. Mo. 1939, provides as follows:

"No person shall exercise the trade or business of a public auctioneer by selling any goods or other property subject to duty under this chapter, or real estate, without a license."

Section 14913, R. S. Mo. 1939, provides as follows:

"Every person who shall exercise the trade or business of an auctioneer without a license shall be liable for the amount of duty payable by law on the property sold."

Section 14915, R. S. Mo. 1939, provides as follows:

"The licenses shall be under the seals of the respective county courts, signed by the clerk, and shall authorize the persons to whom granted to exercise the trade and business of auctioneers, by selling any property, real or personal, by auction within the county for the period of time specified in such license."

It will be noted that a public auctioneer, under Sections 14912 and 14915, supra, has a right to sell real estate or real property if he has secured a license as provided in Chapter 116, R. S. Mo. 1939. The business of a public auctioneer who sells personal property or real estate, occupies an entirely different field from the real estate broker, and we do not think it was the intention of the Legislature to require a public auctioneer, who has been duly licensed by the State of Missouri to sell at public auction personal and real property, to secure an additional license from the Missouri Real Estate Commission in order to sell real estate in his trade or business of public auctioneer.

CONCLUSION

It is, therefore, our opinion that a duly licensed public auctioneer is not required to secure a license from the Missouri Real Estate Commission to sell real estate as a part of his business as such public auctioneer.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

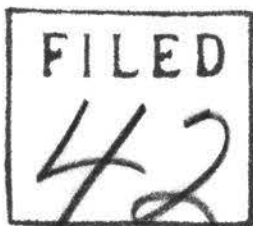
APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP

CRIMINAL COSTS: Solvent convicted defendant in counties
CRIMINAL LAW: of the third class liable for board bill
accruing while committed to jail by
lawful authority as part of costs.

JOHN M. DALTON
XXXXXXXXXXXX



February 17, 1953

John C. Johnsen
XXXXXXXXXX

Honorable Robert L. Hoy
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This opinion is written in response to your request dated January 29, 1953, which request for opinion reads, in part, as follows:

"This letter is being written at the joint request of the Magistrate, the Circuit Clerk and the Prosecuting Attorney of Saline County and respectfully requests a ruling on the questions hereinafter propounded. The questions have to do with the subject of the inclusion of the board bill of prisoners in counties of the third class in taxing the costs against a defendant who is solvent and able to pay the costs.

* * * * *

"The first question which arises is whether or not in class 3 counties the board bill of a prisoner may ever be taxed as costs against a solvent defendant in view of the specific provision of Section 221.100 authorizing a board bill to be taxed as costs in class 1 and class 2 counties. If such board bill may not be taxed as costs against a prisoner in class 3 counties then the answer to the questions hereinafter propounded is pretty well settled. Assuming that such board bill may be taxed as costs and

Honorable Robert L. Hoy

collected from the defendant by reason of the general provisions of sections 221.070 and 221.160 several practical questions arise with reference to the computation of the time of ascertainment.

"Now limiting this matter to class 3 counties and solvent defendants, may I propound you three questions:

"First, where defendant is arrested for a misdemeanor committed in the presence of the officer, e.g. careless and reckless driving, on a Saturday night, held over till Monday and pleads guilty or is convicted and fined, is there any way to include Sunday's board bill in the costs paid by the defendant? Apart from the practical matter of determining the amount, is he in jail 'committed by lawful authority' until the charge is filed and the defendant is brought before the court? If so, how is the amount determined?

"Second, where defendant is sentenced to jail by the Magistrate, e.g. thirty days for common assault, and, at the end of his sentence defendant wishes to pay his costs and be released, is his board bill accruing after he is committed for failure to give bond pending trial and/or his board bill accruing after sentence to be taxed as costs and collected from the defendant? If so, how is the amount determined?

"Third, where defendant is sentenced to the penitentiary and has accumulated a board bill pending trial in the Circuit Court, he failing to make bond after preliminary examination, and the defendant is financially able to pay, and execution would collect it, is the board bill, computed as provided for in section 221.090 and certified to the Circuit Clerk by the County Clerk in the same manner as if it were to be paid by the state, a proper charge to be included in the fee bill for which execution should issue? * * *"

Honorable Robert L. Hoy

We shall answer the questions in the order propounded.

The basic question is whether the board bill of a prisoner may ever be taxed as costs against a solvent defendant in a county of the third class.

To answer this we must resort to the specific statutes on the subject of criminal costs because costs were unknown to the common law, hence one's right to costs is wholly dependent on statutory provisions allowing them.

In the case of *In re Thomasson*, 159 S.W. (2d) 626, 1.c. 628, affirming 119 S.W. (2d) 433, the court said:

" * * * In the first place costs were unknown to the common law and one's right to costs is now wholly dependent on statutory provisions allowing them. And such statutes are strictly construed. 7 R.C.L., Sec. 2, p. 781; *Van Trump v. Sanneman*, 193 Mo. App. 617, 187 S.W. 124; *Ex parte Nelson*, 253 Mo. 627, 162 S.W. 167. * * *"

As a further rule of construction, it is well established that all statutes on the same subject matter must be construed together so as to give effect to each, if possible.

Section 550.010, RSMo 1949, reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county." (Emphasis ours.)

It appears from reading the above statute that the Legislature contemplated that fees for board would be included in the cost bill chargeable against the defendant and that such fees were part of the costs incurred on behalf of the defendant.

Reading this section together with Section 221.070, RSMo 1949, and Section 221.090, RSMo 1949, strengthens our conclusion that the board bill of a prisoner committed to the common jail by lawful authority would be taxed as costs against the defendant.

Honorable Robert L. Hoy

Section 221.070, supra, reads:

"Every person who shall be committed to the common jail within any county in this state, by lawful authority, for any offense or misdemeanor, if he shall be convicted thereof, shall bear the expense of carrying him or her to said jail, and also his or her support while in jail, before he or she shall be discharged; and the property of such person shall be subjected to the payment of such expenses, and shall be bound therefor, from the time of his commitment, and may be levied on and sold, from time to time, under the order of the court having criminal jurisdiction in the county, to satisfy such expenses."

Section 221.090, supra, reads:

"1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost.

"2. When the final determination of any criminal prosecution in a county of the third or fourth class shall be such as to render the state liable for costs under existing laws, it shall be the duty of the county clerk to certify to the clerk of the circuit court or court of common pleas in which the case was determined, the amount due the county for boarding any prisoner who was a party in such case. It shall then be the duty of the clerk of

Honorable Robert L. Hoy

the court in which the case was determined to include in the bill of costs against the state, all fees which are properly chargeable to the state for the board of such prisoners." (Emphasis ours.)

The state or county is liable for certain criminal costs under certain conditions only in the event that the defendant is unable to pay them.

Section 550.020, RSMo 1949, provides, in part:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except, costs incurred on behalf of defendant." (Emphasis ours.)

Section 550.030, RSMo 1949, provides as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant." (Emphasis ours.)

Under Section 550.010, supra, the only costs incurred on behalf of a convicted defendant which the state or county in any event can be required to pay are the costs for board. Under Sections 550.020 and 550.030, supra, the state or county, as the case may be, is liable for that cost only if the convicted defendant is unable to pay.

We take it then that the board bill for a convicted defendant is "properly chargeable" (Section 221.090, supra) to the state in the event that the convicted defendant is unable to pay, subject, of course, to the other restrictions contained

Honorable Robert L. Hoy

in Section 550.020, supra. We, therefore, do not believe that paragraph 2 of Section 221.090, supra, removes the liability of the convicted defendant for his board bill, but rather serves to clarify the fact that such item of expense is part of the costs to be assessed in the case.

Although Section 221.100, RSMo 1949, with respect to the board of prisoners in counties of the first and second classes, is phrased differently than Section 221.090, supra, we do not believe that it would have the effect of altering the conclusion above reached under other sections that the board bill of a convicted defendant in a county of the third class may properly be assessed against such defendant and collected from him if he be financially able to pay.

Having resolved the basic question, we now turn to the question designated "First" in the request for opinion.

Section 544.170, RSMo 1949, provides:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

Honorable Robert L. Hoy

There is no question but that an officer has the authority to arrest without a warrant for a misdemeanor committed in his presence, and, under the last-quoted section, may have such person confined for not more than twenty hours. At the expiration of said twenty-hour period such person shall be discharged unless prior to such expiration he shall have been charged with a criminal offense by the oath of some credible person, and held by warrant to answer to such offense. It follows, therefore, that for the first twenty hours of the defendant's confinement under the hypothetical submitted he has been "committed * * * by lawful authority" within the meaning of Section 221.070, *supra*. To rule otherwise would be to hold that the original confinement was unlawful and render Section 554.170, *supra*, meaningless.

After twenty hours have passed following the lawful arrest and confinement of a defendant without a warrant and the defendant has not been charged with a criminal offense by the oath of some credible person, and held by warrant to answer to such offense, it would seem that thereafter he is no longer "committed * * * by lawful authority" and is entitled to be released. Board bill accruing thereafter should not be chargeable as costs. We realize that practical difficulties may present themselves under the hypothetical submitted, but we know of no exception to the twenty-hour rule contained in Section 544.170, *supra*, just because the twenty-hour period happens to expire on Sunday.

The amount of costs chargeable to the convicted defendant for board bill should be determined as provided in Section 221.090, *supra*. That amount is the actual and necessary cost incurred by the sheriff in the boarding of such prisoner.

Questions designated "Second" and "Third" in the request for opinion deal with other situations under which the defendant is committed to the jail. The basic problem presented in each of them is whether he has been "committed * * * by lawful authority."

Section 532.460, RSMo 1949, with regard to bail, provides:

"When the imprisonment is for a criminal or supposed criminal matter, the court or magistrate before whom the prisoner shall be brought, under the provisions of this chapter, shall not discharge him for any informality, insufficiency or irregularity

Honorable Robert L. Hoy

of the commitment; but if, from the examination taken and certified by the committing magistrate, or other evidence, it appear that there is sufficient legal cause for commitment, he shall proceed to take bail, if the offense be bailable, and good bail be offered; if not, shall commit the prisoner to jail."

Assuming no other defects in the proceeding, the defendant is lawfully committed both after failure to make bail pending trial and after sentence whether before a magistrate or in the circuit court so that in either or both of such events the convicted defendant would be liable for costs for board accruing thereafter.

The fact that these costs accruing after having been "committed * * * by lawful authority" and prior to actual conviction are to be treated the same as costs accruing after conviction is clarified by Section 221.160, RSMo 1949, which reads:

"The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings."

This would seem to answer both of the questions designated "Second" and "Third" in the request for opinion. Here again the amount would be determined as directed in Section 221.090, supra, i.e., the actual and necessary costs incurred by the sheriff in boarding such prisoner.

CONCLUSION

It is the opinion of this office that in a county of the third class the board bill of a convicted defendant is a part of the costs to be assessed in the case; that, if such defendant is solvent and able to pay the costs, such board bill should be included in the costs assessed against the defendant

Honorable Robert L. Hoy

and he should be required to pay such costs among others; that a defendant is "committed * * * by lawful authority" within the meaning of Section 221.070, RSMo 1949, if he is arrested by an officer without a warrant for a misdemeanor committed in the presence of the officer, but that after the expiration of twenty hours if no warrant has issued, he is no longer "committed * * * by lawful authority;" that a defendant is "committed * * * by lawful authority" within the meaning of Section 221.070, RSMo 1949, either after failing to make bail pending trial or after sentence whether before a magistrate or in the circuit court and that his board bill accruing after either of those dates should be included in the costs assessed against him; and that the amount of the board bill chargeable to such convicted defendant as costs is determined as set forth in Section 221.090, RSMo 1949, i.e., the actual and necessary costs incurred by the sheriff in boarding such prisoner.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

OFFICERS: A County Treasurer who marries after being elected may sign her marital name to official documents.

March 6, 1943

310



Miss Pauline Hopen
Treasurer, Cole County
Jefferson City, Missouri

Dear Miss Hopen:

This is to acknowledge receipt of your opinion request dated March 4, 1943, which we quote:

"I have just recently married and would like an opinion as to the correct style of name to use when executing papers in the future.

"Would it be correct for me to sign same with my married name or let it remain Pauline Hopen under which I was elected?"

There is no constitutional or statutory provision which covers your situation, nor could any cases, directly in point, be found. However, the purpose of a signature is first to authenticate the document to which it is attached, and secondly, it is made for the purpose and with the intent that the individual signing the writing will be bound thereby, C. J. Volume 59, Section 3, page 719. It might also be considered as an act of identification, that is, the signing of the name identifies the document as being signed by that particular person. Names are given for the purpose of identification, for separating that object or individual from similar objects or individuals. You, as a person, have not ceased to be the person you were when elected, merely because you married. You merely accepted a new status and assumed your husband's name. Henceforth you will be known and identified by your married name. Your purpose and intent to be bound by the signing of your married name will be the same as when you signed under your maiden name.

Miss Pauline Hopen

-2-

March 5, 1943

However, in order to be perfectly safe you may sign your married name, and below it in parenthesis put your maiden name. For example:

Mrs. Sam C. Black (married name)
(nee Miss Jessica Cox)

At least you could effectively sign your documents as shown by the example for a reasonable length of time, or until you became sufficiently identified by your married name to dispense with the addition of your maiden name.

It is also the suggestion of this office that you have your marriage certificate put on record in this county.

CONCLUSION

A signature by you, in your official capacity as County Treasurer, under your married name would be legal and effective.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McRITERICK
Attorney General of Missouri

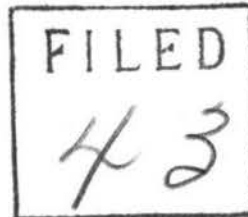
WCB:BAW

RECORDER OF DEEDS
AND RECORDS:

Recorded instruments once recorded cannot
be changed on the same record.

March 29, 1943

Mr. C. B. Hudson
Recorder of Deeds
Lawrence County
Mt. Vernon, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of March 26, 1943, which reads as follows:

"I am inclosing a letter from a lady, where she asks a minor change be made in her marriage license. The letter will explain better perhaps than I could just what she wants. Am I permitted to do this at her request? Also, there is a woman working in an abstract office here, who is quite active in securing birth certificates for people. She goes to the record book, and if the ages are not given, she inserts the age, and asks me to make a certified copy from the record. Of course, I notice that the ages are written in by pen and she admits, and says that they have done lots of them that way. I suppose she means the Recorder ahead of me, and herself. The Prosecuting Atty. advised me to get an opinion from you. Is this a violation of the law, or is it permissible?"

Section 13165 R. S. Missouri, 1939, reads as follows:

"The recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other

March 29, 1943

writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, with the plats, surveys, schedules and other papers therein referred to, and thereto annexed, in the order of time when the same shall have been delivered for record, by writing them word for word, in a fair hand, noting, at the foot of such record, all interlineations and erasures and words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year, when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered." (Underscoring ours.)

Under the above section the recorder of deeds must record all instruments delivered to him for record, word for word, and the instrument shall be recorded, and considered as recorded, from the time it was delivered to him for record. There is no provision which would allow him to change the original instrument as delivered, or change the reading of the instrument after the writing of the instrument into the record word for word.

Section 13161 R. S. Missouri, 1939, partially reads as follows:

" It shall be the duty of recorders to record: * * * * third, all marriage contracts and certificates of marriage; * * * * fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

The above two clauses in Section 13161, supra, make it mandatory on the recorder of deeds to accept for recording marriage licenses and birth certificates.

Section 3367 Missouri, 1939, partially reads as follows:

" * * * Every officer or person who shall fail to return a license within ninety days after the issuing of the same, or who shall make a false return thereon, or any recorder who shall willfully make a false record of any marriage license or return thereon, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided in the preceding part of this section."

Under the above section a recorder who shall willfully make a false record of any marriage license or return thereon, shall be deemed guilty of a misdemeanor.

Sections 4567 and 4568 R. S. Missouri, 1939, provide a punishment for forgery in the second degree for every person who, with intent to defraud, should falsely alter or falsify any record, conveyance or instrument, which record or copy of the record, by law, could be used as evidence. Of course under these sections the question of attempt to defraud is involved, but, under the facts set out in your request, it is a very close question in the case of the birth certificates as to whether there was an intent to defraud. In your request you state that the age of certain persons have been interlined in records of birth certificates which appear to be recorded at a prior date. The changing of such a record would be forgery, and it was so held in the case of *In Re Warden*, 146 S. W. (2d) 874. In this case a lawyer was charged with placing the names of persons other than those contained in the original recorded marriage license.

Mr. C. B. Hudson

(4)

March 29, 1943

Under Section 13165, supra, the recorder of deeds, upon recording an instrument that is subject to recording, must make a notation at the foot of such record of all interlineations, erasures and words visibly written on erasures. Under this section if interlinations have been made it should so appear at the foot of the recorded instrument.

Under Section 15077, R. S. Missouri, 1939, whenever a certified copy, or copies of any public record in the State of Missouri is required to perfect the claim of persons in the Armed Forces of the United States, or if any dependent of such person desires a certified copy for the purpose of prosecuting a claim upon the Government of the United States, the recorder of deeds should furnish the certified copy of discharge upon request, without any fee, or compensation, therefor.

CONCLUSION

It is, therefore, the opinion of this department, that the recorder of deeds cannot change a marriage license issued to Elsie A. Nelms so that it would read Elsie R. Nelms, and then furnish a certified copy of such marriage license.

It is further the opinion of this department that it is unlawful for any person to change or insert interlineations in recorded birth certificates, after the same has once been recorded and such interlineations should not be permitted.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General of Missouri

W. J. BURKE
Assistant Attorney General

WJB:RW

Criminal Costs:

COUNTY COURT: County Court must pay criminal costs in all cases properly certified, though such costs are not included in county budget; county judge incurs no personal liability in signing warrant where two-thirds of court vote to pay warrant; persons suffering from communicable diseases may be prosecuted for violation of rules and regulations of State Board of Health.

August 16, 1943

Honorable W. C. Huffman
Presiding Judge
Dunklin County Court
Kennett, Missouri

8/19



Dear Judge Huffman:

This office is in receipt of your letter of recent date in which you request an opinion, which, omitting caption and signature, is as follows:

"Reference is made to your letter of a former date to Judge L. A. Pickard relative to payment to Sheriff of a commitment fee for committing persons to County jail.

"I have read that letter but am unable to give you the date it was written because it is now missing from the County Court's files.

"The present County Court is paying commitment fees to the Sheriff without the proper certification by the Prosecuting Attorney and the Circuit Clerk. I have voted to not pay these commitment fees without proper certification but have been out-voted.

"I would like to know if I am liable under any statute, and particularly Section 4240 R. S. 1939, for signing the warrant paying commitment fees by virtue of being Presiding Judge of the County Court where I have voted to not pay the

August 16, 1943

fees and merely sign the warrant to carry out the will of a majority of the court.

"Dunklin County is also being subjected to extra expense because of a campaign instigated by the U. S. Army to reduce venereal disease among the women associating with soldiers at the Malden Air Field. Twenty seven women were picked up last Saturday night and placed in the County Jail under quarantine by the State Health Department. I understand some will be released and some remain in the Jail, under quarantine, from 10 to 20 days for treatment and others will be picked up from time to time.

"I personally feel that this campaign was needed in this county and much good will come from it. However Dunklin County's budget for 1943 makes no provision for the additional expense involved on the County.

"The Sheriff is billing the County for a commitment fee in each instance and board per person at the rate of 75 cents per day.

"Will you kindly advise me if Dunklin County is liable for the commitment and board of these women quarantined by order of the State Health Department?"

Disposing of the matter of the payment of fees, we direct your attention to Section 4240, R. S. Mo. 1939, which reads as follows:

"Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted,

as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

This section provides the proper procedure for every fee bill presented to the County Court. See also Section 4246, R. S. Mo. 1939, which reads as follows:

"Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

And further, Section 4247, R. S. Mo. 1939, which is the penalty section for those quoted above.

Having before us these acts of legislation we see that the duties of the court, the officers and the prosecuting attorney are clearly set out and these sections need no interpretation on our part. The duties are clear and stated in emphatic language.

August 16, 1943

Devoting ourselves to the question raised in your letter: "I would like to know if I am liable under any statute for signing the warrant paying commitment fees where I have voted not to pay the fees and merely sign the warrant to carry out the will of the majority of the court," your attention is directed to the provisions of Section 13831, R. S. Mo. 1939, which in part provides as follows:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, * * * * *

Your attention is further directed to the provisions of Section 13832, R. S. Mo. 1939, which in part provides as follows:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, * * * * *

(Emphasis ours.)

The provisions of these two statutes are clearly unambiguous and leave no room for construction. Whenever a warrant shall be drawn for an amount ascertained to be due, the majority of your court having ascertained that certain fees are due, then it is mandatory on the part of the president of the court, while court is in session, to sign such warrant. The mere signing of the warrant is purely ministerial and does not require the exercise of discretion on the part of the president

August 16, 1943

of the court. This is the interpretation we give to the word "shall" appearing in the section above. The president of the court, as such, if he refuses to sign the warrant, may be prosecuted under the provisions of the statute, Section 13843, R. S. Mo. 1939. It would seem then that in performing a purely ministerial function as president of the court no liability would fall on the president as such. We find a decision in point and merely cite same due to the extreme length of the opinion. Cummins vs. Public Service Co., 66 S. W. (2d) 290. This decision is consistent with the theory that where a majority of the court shall ascertain a sum of money to be due then the president of the court may be required to sign the warrant by which payment may be made.

Concerning ourselves now with the question of criminal costs, we quote Section 4222, R. S. Mo. 1939, reading as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Also Section 4223, R. S. Mo. 1939, which reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It would seem from a reading of the above and foregoing that, even though the county had made no budget allowance for the additional expenses involved on the county, the county is still required to pay criminal costs presented during the current year.

Turning now to the portion of your request which involves the State Board of Health and the powers and duties of that board to safeguard health of persons in the state, counties, cities, villages and towns, we find that Section 9735, R. S. Mo. 1939, uses the following language:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

Looking now to the penalty section, we find that Section 9750, R. S. Mo. 1939, uses the following language:

"Any person or persons violating, refusing or neglecting to obey the provisions of this article or any of the rules and regulations or procedures made by the state board of health in accordance with this article, or who shall leave any pesthouse, or isolation hospital, or quarantined house, or place without the consent of the health officer having jurisdiction, or who evades or breaks quarantine or

August 16, 1943

knowingly conceals a case of contagious, infectious, or communicable disease, or who removes, destroys, obstructs from view, or tears down any quarantine card, cloth or notice posted by the attending physician or by the health officer, or by direction of a proper health officer, shall be guilty of a misdemeanor."

The prosecution of persons with communicable diseases is based on the two statutes quoted above and, in order to elaborate upon the power of the State Board of Health to inaugurate legislation respecting control of venereal diseases, we enclose an opinion of this office given Dr. Harry F. Parker, State Health Commissioner, under date of November 16, 1939, which sets out in detail the duties of the said board. Further, we have appended to this opinion the amendments to the Missouri Public Health Manual as adopted by the Board on July 12, 1943. Taking these documents, together with this opinion, the writer believes you will have no difficulty in clarifying the situation in respect to the prosecution of persons found to be suffering from these diseases within your county.

CONCLUSION

From the above and foregoing, it is, therefore, the conclusion of this department that

(1) A county judge signing a warrant as president of the court, the majority of the court having determined the warrant was due an officer, is performing a ministerial act and in so doing incurs no personal liability;

(2) A county court is required to pay criminal costs despite the fact such costs have not been included in the county budget;

(3) Prosecution of persons found to be suffering from communicable diseases is provided for in the statutes and violations of the rules and regulations of the State Board of Health subject the accused violator to prosecution under

Hon. W. C. Huffman

-8-

August 16, 1943

the statutes, and the county court is required to pay the usual fees.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:CP

SCHOOLS: Missouri School for the Deaf cannot sell typewriters directly to the War Production Board.

April 28, 1943

5-5



Mr. Truman L. Ingle
Superintendent
Missouri School for the Deaf
Fulton, Missouri

Dear Sir:

We are in receipt of your opinion request of April 22, 1943, which reads:

"We have had repeated requests from the War Production Board asking that we sell them a certain number of our typewriters.

"While we will be functioning under rather a difficult set-up if we do this, we do want to do everything possible to further the war effort. I am somewhat concerned as to whether or not we have the legal right to offer these typewriters for sale to the War Production Board.

"I am, therefore, writing to request an opinion from your office as to whether or not we can legally turn over one or more of our typewriters to the War Production Board. Of course, it is understood that we receive for these typewriters the amount paid as set-up by the War Production Board."

Your question, "whether or not we can legally turn over one or more of our typewriters to the War Production Board" involves the right that you may have to dispose of State property.

There is no statutory or constitutional provision that expressly gives the board of managers of the School for the Deaf the power or authority to dispose of property belonging to the

State. Section 10864, R. S. Missouri 1939, seems to be the only applicable section on the property of these schools, as to its control. Said section provides:

"The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

This section speaks of "control and care" of state property but nowhere within the statute is disposal of state property discussed, that is, in regard to personalty. The "control and care" of the board of managers, in regard to property, is limited to devoting the property, both real and personal, to the use of the school. No other function for the property is discussed. In fact there is an express limitation on the method of disposal of real property by the board of managers. This is found in the second sentence of said section. It might be argued that this express limitation is exclusive, and that the Legislature at the time of the enactment of this section might have contemplated the disposal of personal property directly by the board of managers since they did not expressly negative such possibility, while they were expressly negating the power of the board of managers to sell real property. This theory has been followed many times in disposing of certain problems. However, this office does not believe that the theory of "expressio unius est exclusio alterius" should be invoked here. That theory is explained in Corpus Juris, wherein it is stated, 59 C. J., Section 582, page 984:

"In accordance with the maxim, 'expressio unius est exclusio alterius,' where a statute enumerates the things upon which it is to operate, or forbids certain things,

it is to be construed as excluding from its effect all those not expressly mentioned; and where it directs the performance of certain things in a particular manner, or by a particular person, it implies that it shall not be done otherwise nor by a different person. So where it prescribes certain conditions, compliance with which are necessary to the existence of a right, no other conditions need be fulfilled; but the maxim should be applied only as a means of discovering the legislative intent, and should never be permitted to defeat the plainly indicated purpose of the legislature, nor will it generally exclude the application of the statute to things of the same class as those expressly mentioned which have come into existence since the passage of the statute."

The first difficulty with the above theory is in the allocation of the proceeds from a sale, if any, of the typewriters to the War Production Board. What use would be made of the proceeds? To whom should the War Production Board make remuneration? While these problems could either be circumvented or solved, they do present some difficulty.

The major difficulty with allowing the board of managers for the School for the Deaf to dispose of the typewriters is found in Section 14595, R. S. Missouri 1939. Therein it is provided:

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the appropriations of the departments concerned. He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof. He shall keep currently an inventory of all removable equipment owned by the state."

The second sentence of said section provides for the purchasing agent of the State of Missouri to "sell any surplus or

April 28, 1943

unneeded supplies or property in his hands or owned by the state or any department thereof." Under this section it seems that the power of sale of state property is vested in the purchasing agent. In view of this section the board of managers of the School for the Deaf, apparently, is prevented from selling any "unneeded or surplus" supplies on their own initiative.

The proper method would seem to be for the board of managers of the School for the Deaf to request or advise the purchasing agent to make a sale of the typewriters, which the school wishes to dispose of to the War Production Board. The purchasing agent would then make the sale and handle the proceeds therefrom, if he deemed such sale proper.

CONCLUSION

The board of managers of the School for the Deaf does not have the authority to make a sale of state property. A sale of real estate must be with the approval of the Legislature, under Section 10864, R. S. Missouri 1939, and the sale of any personal property must be made through the purchasing agent for the State of Missouri, under Section 14595, R. S. Missouri 1939. Therefore, the board of managers of the School for the Deaf cannot directly sell its personal property, typewriters, in the present instance, to the War Production Board. Such sale must be made by the purchasing agent of Missouri.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WCB:EAW

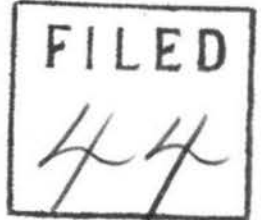
SCHOOLS:

DEAF AND DUMB SCHOOL:

Children under six years of age may
not be admitted to the Missouri School
for the Deaf.

August 16, 1943

Hon. Truman L. Ingle
Superintendent, Missouri School
for the Deaf
Fulton, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the question of whether or not children under six years of age may be admitted to the Missouri School for the Deaf at Fulton, Missouri.

From a reading of Article 25 of Chapter 72, R. S. Mo. 1939, which relates to the Missouri School for the Deaf, and especially Section 10853, it would seem that there was no minimum age of limitation under the statutes for the admission of such children to that school. However, you have stated in your letter that public school monies have been appropriated to maintain this school. That being the case, we think you would have to look to the Constitution for your authority to receive children into that institution for training. Section 1 of Article XI reads as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

Section 6 of the same Article, from which a portion of the public school fund is derived, provides as follows:

"The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all

moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts, or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

Also, under Section 7 of the same Article, it is provided that at least 25 percent of the state revenue, exclusive of the interest and sinking fund, shall be applied annually to the support of public schools.

In the case of *Rogers v. McCraw, et al.*, 61 Mo. App. 407, the St. Louis Court of Appeals had before it the question of whether or not a person over six and under twenty-one years of age should be admitted to a public school. The court sustained a demurrer to the petition in that case because the school age was from six to twenty years. At l.c. 409 the court said:

"To entitle the plaintiff to maintain the action, she must have been within the school age (as fixed by the constitution) at the time she was prohibited from attending the school. Roach v. Board of Public Schools, 77 Mo. 484.

This is one of the essential facts of her alleged cause of action. Under the code every constitutive fact must be distinctly set forth in the petition; otherwise it is the subject of demurrer. The averment is that at the time the plaintiff was excluded from the school 'she was over six and under twenty-one years of age.' It is manifest that the petition failed to state a cause of action."

Also in the case of Roach v. Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, the court in speaking of the foregoing provision of the Constitution at l.c. 488 said:

"As to the second point, we think differently. The provisions of the 1st and 6th sections of article 11 of the constitution of the State, taken together, are conclusive on this point. The 1st section in effect declares that all persons in the state between the ages of six and twenty shall be gratuitously instructed in the free public schools therein provided for, and the 6th section in like manner declares that the 'public school fund,' therein mentioned, shall be faithfully appropriated for establishing and maintaining the 'free public schools' provided for in said article, and for no other uses or purposes whatsoever. The two sections, taken together, amount to both a requirement and a prohibition. By the first, free public schools for the gratuitous instruction of all persons in the State between the ages of six and twenty are required, but by the sixth, the funds thus dedicated to that use are prohibited from being expended for any other uses or purposes whatsoever. The expenditure by the defendant of its revenues for the purpose of admitting and instructing in said schools children under the age of six years, is a use of its funds not authorized, * * * * *"

Hon. Truman L. Ingle.

-4-

August 16, 1943

Unless that institution is supported from funds other than the public school funds, it would seem that you would not be authorized to admit a child under six year of age for training.

CONCLUSION.

From the foregoing, it is the opinion of this Department that public school funds appropriated to the Missouri School for the Deaf may not be expended for the purpose of training children under six years of age.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:PD

SCHOOL FOR THE DEAF:
ADMITTANCE OF CHILD
UNDER 6 YEARS OF AGE:

Children under six years of age
may be admitted to Blind and Deaf
School if no school funds are used
for their maintenance and educa-
tion.

September 4, 1943

21 *John*
Hon. Truman L. Ingle, Superintendent
Missouri School for the Deaf
Fulton, Missouri

10-18
FILED
44

Dear Sir:

This is in reply to yours of recent date on the question of the school's authority to admit deaf children under six years of age for training. In our recent opinion to you we ruled that such children could not be admitted and schooled where the funds for such training and schooling come from the school funds. In this request you inquire if moneys from the "operation fund" of that institution could be used for the training and schooling of such children. In your letter you state the source of certain funds to that institution as follows:

"In addition to State School Monies, we have what is known as the Missouri School for the Deaf Fund. This fund is accumulated through monies earned from sale of cattle, excess milk or cream, payments by parents and counties for clothing and incidental expenses of the children."

Section 10853, R. S. Missouri, 1939, provides as follows:

"All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively.

All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

From this Section, the lawmakers did not fix the minimum ages of children to the school for the blind and deaf.

Under Section 1 of Article IV of the Constitution of Missouri, the General Assembly may enact any law not in violation of the Constitution. The only provision of the Constitution, which might be violated by this Section, is Section 1 of Article XI which provides for free public schools "for the gratuitous instruction of all persons in this state between the ages of six and twenty years."

Section 6 of Article XI of the Constitution of Missouri provides as follows:

"The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund; the annual income of which fund, together with so much of the ordinary revenue of the State as

may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

The funds created by virtue of the provisions of said Section 6, supra, can only be used for the establishment and maintenance of free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty.

Certainly the lawmakers, in passing Section 10853, supra, had a reason for only fixing the maximum age of children who could be admitted to the school for the blind and deaf. We held in a former opinion that public school funds cannot be used for educating and training deaf and blind children under six years of age. However, this would not prevent the appropriation and expenditure of other public funds for this purpose. But, Section 46 of Article IV of the Constitution has this provision:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

In passing on the provisions of this section, the Supreme Court, in the case of Jasper County Farm Bureau v. Jasper County, 286 S. W. 381, 383, said:

"It is also true that many objects for which money may be appropriated are so clearly public in their nature that there could not well be any difference of opinion on the subject, such, for example, as public charities, and appropriations provided for the care of the indigent, destitute, and insane, either in institutions exclusively under state control or those

September 4, 1943.

maintained by corporations for purely
charitable purposes. * * * * "

So, it would seem that the lawmakers could appropriate moneys out of revenue for the purpose of keeping, maintaining and educating blind and deaf children under the heading of Public Charities.

From your statement it seems that your institution derives funds from sources other than school funds. So long as you do not use any of the public school funds to train and educate blind and deaf children under six years of age, you are complying with the statute in admitting such children to the school.

CONCLUSION

From the foregoing, it is the opinion of this department that children under six years of age, who are blind or deaf, may be admitted to the school for the blind and deaf at Fulton if no public school funds are expended for the training, educating and maintaining of such children. We are further of the opinion that public funds other than public school funds may be expended for said purposes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:jn

APPROPRIATIONS : Salaries for skilled labor or technical
ITEMIZING. : services may be paid out of the appro-
: priation for "Repairs and Replacements" or
: "Additions" if services of such skilled
: labor or technicians are used for re-
: pairs and replacements or additions.

October 15, 1943

18-2 2



Mr. Truman L. Ingle
Superintendent,
Missouri School for the Deaf
Fulton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you make the following statement and request:

"It is our desire to know whether or not we may pay salaries for skilled labor or technical services out of Repairs and Replacement Fund for work that is actually repair work or replacement.

"We are also anxious to know whether or not we may pay such salaries from Additions Fund when the new work is an addition; such as, a new milk house, new work on the grounds or other new equipment."

The Constitution (Sec. 19, Art. 10), requires appropriations to distinctly specify the sum appropriated and the object to which it is to be applied: Sec. 10902, R. S. 1939, which relates to the State Budget provides as follows:

"Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriations shall be made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure."

In our research we fail to find where a case on such a question has been before our courts.

As a rule however, we find that the general procedure has been that if any employee or officer whose duties are performed for a certain purpose that his compensation therefor may be charged to the appropriation made for that purpose. We think this is in conformity

Mr. Truman L. Ingle

-2-

Oct. 15, 1943

to the above constitutional and statutory provision.

C O N C L U S I O N .

Therefore, if an officer or employee performs services in connection with "repairs and replacement" or "additions" to a department or institution, that the compensation of such officer or employee for such services may be paid out of the fund appropriated for that purpose.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:LeC

COUNTY COURT: Upon appointment of county superintendent of public welfare the appointment of a probate parole and truant officer is automatically suspended.

January 21, 1943

Honorable Sears Jayne
Prosecuting Attorney
Clark County
Kahoka, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of January 18, 1943, which reads as follows:

"Acting under the authority of Chap. 56, Art. 11, Sections 9719 to 9732, inclusive, R. S. Missouri, 1939, I have recently petitioned the County Court of Clark County Missouri to appoint me as Superintendent of Public Welfare so that the duties of that office can be combined with the duties of Prosecuting Attorney at a saving to the county.

"In considering the matter, the County Court has discovered that on June 26, 1939 (by the act of a prior court) an order was entered appointing an individual in this county as "Probate Parole and Truant Officer" for a term of four years starting July 1, 1939. It appears that the order originally read "three" years but has been changed to "four" years. The original order is not in the files.

"Will you please advise us as to the effect of this old order in the following particulars:

"(1) Can a County Court make an appointment extending beyond the expiration of the term of office of the members of the court.

"(2) Would not an appointment under Chap. 56, Art. 11, and particularly under Sec. 9719 thereof automatically suspend the duties and salary of a "Probate Parole and Truant Officer."

I

Your first question is whether or not a county court can make an appointment extending beyond the expiration of the term of office of the members of the court.

Section 36, Article VI of the Constitution of the State of Missouri, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By reason of this section of the Constitution, the legislature enacted Section 2480 R. S. Missouri, 1939, which reads as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In your request you stated that the county court had discovered that on June 26, 1939, a prior county court had entered an order appointing an individual in this county as "Probate Parole and Truant Officer", for a term of four years, starting July 1, 1939.

In a recent case handed down by the Supreme Court of this State, it was held that the county court could appoint janitors, and set their salary, for a term that might hold over under the next new county court.

It was so held in the case of Aslin v. Stoddard County, 106 S. W. (2d) 472, l. c. 475, where the court said:

"By section 2078, R. S. 1929, Mo. St. Ann. Sec. 2078, p. 2658, it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and

service as may reasonably be requisite in order to effectuate the express power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body. See, on this question, *Manley v. Scott*, 108 Minn. 142, 121 N. W. 628, 630, 29 L. R. A. (N. S.) 652, and notes in latter volume.

"No case from this state is cited nor have we found any directly adjudicating the precise question now under consideration, viz., whether the county court may lawfully make a contract, binding upon the county (assuming good faith in the making thereof and reasonableness as to time of performance), the performance of which will extend beyond the terms of office of part or all of the members of the court as then constituted. * * * "

The court further said, on page 477, of the same case:

"In our opinion, a county court has power to make a contract such as that here in question, for a

reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold.

"We take next the contention that the contract was for an unreasonable time and was made in bad faith and collusively. As to the time factor we think it clear that one year cannot be considered an unreasonable term of employment, the circumstances considered. The county court needed the services of a competent janitor (a continuing need), and, being agent of the county and trustee of its funds (Kansas City Disinfecting & Mfg. Co. v. Bates County, 273 Mo. 300, 201 S. W. 92), owed the county the duty to conserve its funds and to procure necessary labor and service at the best available price. It may well be that, in the judgment of the court, a competent janitor, who might, perhaps, have found employment elsewhere, could be hired at the time in question for the definite term of one year, to the advantage of the county. The result in the instant case emphasizes that thought. There is no contention that plaintiff was not competent and suitable for the work for which he was employed. Prior to his employment Parks had been receiving \$60. per month for doing the same work which plaintiff contracted and was willing to do for one year at \$50 per month. The 'new' county court (so called in appellant's brief) continued to pay Parks \$60 per

month. The contract with plaintiff, if carried out, would have saved the county \$10 a month for a year -- a substantial saving on an item of the size involved.

"Neither do we think the agreed facts would justify us in holding, as a matter of law, that the court acted fraudulently or in bad faith in employing plaintiff. Fraud is not presumed. Contra, right rather than wrong action is presumed, if presumption may be indulged. So far as concerns the employment of plaintiff alone, that contract certainly cannot be said to indicate bad faith or wrongful purpose on the part of the court. As we have pointed out, it was calculated to conserve the county's funds -- to save money for the county, and would have so resulted had it been adhered to. But it is said that, at the same time, when two members of the court were about to bid farewell to their official positions, the court made three other 'appointments,' each for a term of one year, when the statute did not fix any definite term for such appointments or employments. One of those 'appointments,' that of Mooney, seems to have been considered by the so-called 'new court' as all right, since he was retained (though for an indefinite term). As to none of them is there any showing concerning salaries, or the reasons why the county court made the alleged 'appointments'

January 21, 1943

on December 31, 1932. We have but the bare fact that the appointments were made. From this it is argued that said appointments were made collusively and in bad faith, for the purpose of forestalling the court, after the two newly elected members took office, from appointing other persons to such positions, and that, inferentially, it must follow that plaintiff's employment was actuated by the same purpose. We cannot say, as matter of law, that it conclusively so appears. The trial court found the issues for the plaintiff. We would not be justified in setting aside that finding."

Under the holding in the above case the old county court could appoint a probate parole and truant officer for a term that may not be terminated until some time during the term of the new county court, providing the term and salary are reasonable.

CONCLUSION

It is, therefore, the opinion of this department that the members of the prior county court of Clark County, whose terms have expired, could have appointed an individual as "Probate Parole and Truant Officer", for a term of four years starting July 1, 1939, and could fix his salary, even though the term of employment was carried over into the term of the new county court, if such employment, salary and term of office were reasonable.

II

Your second question is whether or not an appointment under Chapter 56, Article 2 of the Revised Statutes of Missouri, 1939, and particularly under Section 9719 thereof, automatically suspends the duties and salaries of a Probate Parole and Truant Officer.

You have informed this office, since writing your request, that the appointment of Probate Parole and Truant Officer was made by the previous county court and not by the circuit judge.

Section 9719 R. S. Missouri, 1939, reads as follows:

"The county court in each county may in its discretion appoint a county superintendent of public welfare, and such assistants as it may deem necessary. Whenever the county court of any county has appointed a superintendent of public welfare such officer shall assume all the powers and duties now conferred by law upon the probation or parole officer of such county and shall assume all the powers and duties of the attendance officer in said county and all the powers and the duties of the attendance officer in any incorporated town or village having a population of more than 1,000 inhabitants, and no other or different probation or parole officer or attendance officer or officers shall be appointed by the judge of the juvenile court, by the county superintendent of public schools, or by the school board or any incorporated city, town or village school district or consolidated school district: Providing, however, that the provision

of this section shall not apply to counties which now have or which shall hereafter have a population of more than 50,000 inhabitants."

Under the above section the county court appoints the superintendent of public welfare and his assistants. This section was originally enacted and appears in the Laws of 1921, page 586, Section 1. In construing this section the Supreme Court of this State en banc, in the case of Poindexter v. Pettis County, 246 S. W. 38, 1. c. 40, said:

"So as justly contended for by counsel for the appellant, the legal effect of the appointment of White was to automatically suspend the term of office of Poindexter, who was appointed under section 1144 of the Revised Statutes of Missouri 1919, as probation officer. All the duties devolving upon Poindexter as probation officer, by the act of 1921, supra, were transferred to White. State of Washington ex rel. Voris v. City of Seattle, 74 Wash. 199, 133 Pac. 11, 4 A. L. R. 198; Donaghy v. Macy, 167 Mass. 178, 45 N. E. 87. * * *

* * * * *

"Under the rulings announced in these cases, unquestionably it was the intention of the Legislature by the act of 1921 to repeal section 1144, R. S. 1919.

"It necessarily follows from what has been said that the respondent was not an office holder under the laws of this state at the time for which he claims to have rendered the services sued for. He was therefore not entitled to the salary for which he sued."

Under the opinion in the above case, it was held that unquestionably it was the intention of the legislature, by the Act of 1921, to repeal Section 1144 R. S. Missouri, 1919. Section 1144 R. S. Missouri, 1919, is now Section 9708 R. S. Missouri, 1939, and reads as follows:

"The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

Under the opinion in the above case, it is specifically stated that the appointment by the county court automatically suspended the term of office of the probation officer who was appointed by the circuit judge, under Section 9708, *supra*.

We are aware of the holding in the case of *Cunio v. Franklin County*, 285 S. W. 1007, where the court, at page 1008, said:

"The circuit judge of Franklin county, speaking by and through the records of the circuit court only, could legally appoint plaintiff to the office of probation officer, and the said copy of said order of the county court was inadmissible and incompetent as proof of his appointment to said office. Reversible error was committed in the admission in evidence of said record.

"The plaintiff not having been duly appointed, and as he was not a de jure officer of defendant county, this suit for salary cannot be maintained."

Under the holding in the above case the Supreme Court, in a division opinion (that is, division number one), held that the circuit judge of Franklin County was the only one who could legally appoint a person to the office of probation officer. This case, although a later case, is in conflict with the case of Poindexter v. Pettis County, supra. We are compelled, however, to follow the ruling of the Supreme Court en banc, although an earlier case, in preference to following a conflicting division opinion, of division number one, which is a later case.

It is a rule of this State, that banc opinions are controlling where a conflicting opinion is even later rendered by a division opinion. It was so held in the case of Benner v. Terminal R. R. Ass'n of St. Louis, 156 S. W. (2d) 657, 1. c. 660, where the court said:

" * * * It is to be noted, however, that all of the cases cited by defendant were divisional opinions.

January 21, 1943

As such they cannot stand if they are in conflict with the principles laid down in the Price case, which was a decision of the court en banc."

Under Section 9719, supra, it appears that the legislature intended that it was not mandatory upon the county court to appoint a county superintendent of public welfare and if a county superintendent of public welfare was not appointed, then the appointment by the circuit judge of a probation officer would remain in effect. It is also very noticeable, under Section 9719, supra, that upon the appointment of county superintendent of public welfare that no other or different probation or parole officer could be appointed by the judge of the juvenile court, who is also a circuit judge.

Since the previous county court appointed a Probate Parole and Truant Officer and not a county superintendent of public welfare, the appointment of a county superintendent of public welfare would automatically suspend the appointment of a Probate Parole and Truant Officer, as was made by the prior county court. We know of no office described as a Probate Parole and Truant Office.

CONCLUSION

It is, therefore, the opinion of this department, that an appointment of a person under the provisions of Section 9719 R. S. Missouri, 1939, to the office of county superintendent of public welfare, would automatically suspend the appointment of a so-called Probate Parole and Truant Officer by the previous county court.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General
WJB:RW

ROY MCKITTRICK
Attorney General of Missouri

ROADS AND BRIDGES: Town board cannot vote by mail in eight-mile road district, when not situated more than ten miles from county seat.

February 11, 1943

Honorable Sears Jayne
Prosecuting Attorney
Clark County
Kahoka, Missouri



Dear Sir:

We are in receipt of your request for an opinion in the matter of the appointment of road commissioner of the Wayland Special Road District.

This request involves solely the construction of Section 8675 R. S. Missouri, 1939. Your request partially reads as follows:

"The commissioner whose term expires this year is Mr. Charles Fore, who happens to be Chairman of the County Democratic Committee. Acting under Section 8675 the Town Board of Wayland met on January 22nd, and made a written certificate of their choice of Mr. Charles Fore for re-election as commissioner in the form of a resolution stating that Mr. Charles Fore was the only nominee and that he was the unanimous choice of all five members of the Town Board. This written certificate bore the signature of the Mayor and was attested by the City Clerk, and was then sealed and transmitted by mail to the County Clerk of Clark County.

"Upon receipt of the above certificate the three members of the County Court failed to act on the matter on the day designated by the statute, but instead wrote a letter to the members of the Town Board asking that the Town Board meet with them. Yesterday some of the members of the Town Board, who could get off from their employment, called upon the County Court and stated orally that their vote as cast by the above mentioned certificate was the vote of the Town Board. In the meantime, however, one of the members of the Town Board had signed some kind of a statement written in long hand, not attested in any manner by the signature of the Mayor or by the City Clerk, stating that he wished to cast his vote for another party. At this point the County Court asked me for an opinion on the matter and I gave them my opinion, verbally, that the vote of the Town Board as shown by the certificate, being substantially in due form, was the vote of the Town Board on the matter and that the three members of the County Court might vote for someone else but that it appeared that Mr. Charles Fore had been re-elected because there were five members of the Town Board and only three members of the County Court. * * * * *

"There might be a point raised as to the distance of the Town of Wayland from the Courthouse in Kahoka, but some of the members of the Town Board tell me that they understood that the distance was sufficient to bring it

under the terms of the proviso paragraph of Section 8675 and having acted under that Section in good faith, it is my opinion that a mistake of fact as to the distance of possibly one-half mile or such a matter would have no effect upon the legality of the certificate of election.

"Objection has been made that the certificate did not designate a second or third choice, but it will be noted above that the resolution signed by the Town Board and signed by each member thereof, stated that no other nominations had been made, therefore the Town Board could not have designated a second or third choice.

"Any opinion you may care to give me regarding the matter will be appreciated very much. In the meantime, the re-elected commissioner is assuming that he has been re-elected to the office because the vote of the three members of the County Court could not change the result in any manner, and said re-elected commissioner will, on March 1st, assume the duties of the office and continue in the office until some action to oust him is taken."

In your request you state that the town of Wayland may be one-half mile less than ten miles from Kahoka, the county seat.

Section 8675 R. S. Missouri, 1939, reads as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting

place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk." (Underscoring ours.)

Under the above section, it is mandatory that the members of the town board meet with the county court within two weeks after the voters in such a district shall adopt the provisions of Article 10, Chapter 46 of the Revised Statutes of Missouri, 1939. At the meeting in the county court room the presiding judge shall preside, and the county clerk shall keep a record. At this meeting the commissioners for the road district shall be appointed, one for three years, one for two years, and one for one year. The same procedure as for original appointment is followed when vacancies occur.

When the meeting of the county court for the city, town or village officers is called, the city, town or village officers each are entitled to vote.

It was so held in the case of State ex inf. Holt, Pros. Attorney., ex rel. Jones v. Meyer, 12 S. W. (2d) 489, 1. c. 490, where the court said:

"Respondent, Meyer, contends that under section 10802, R. S. 1919, the mayor and councilmen are each entitled to cast a vote for commissioner.

"Relator, Jones, contends the mayor and councilmen sit as one member of the county court and together have only one vote, and that, two members of the county court having voted for him, he thereby received a majority of the legal votes cast.

"These contentions call for a construction of section 10802, * * * *

"It will be noted, that, on the assembling of the mayor, the members of the council, and members of the county court, the meeting is declared organized, with the presiding judge as the presiding officer and the county clerk as clerk of the meeting. They do not meet as officers of the city or as officers of the county. They meet as one body, for the sole purpose of appointing the commissioners. Neither the city council nor the county court has any control over the public highways within the district outside of the corporate limits of the city. Such control is lodged exclusively with the board of commissioners. Section 10809, R. S. 1919.

* * * * *

"The statute no more limits the mayor and members of the council to one vote than it limits the members of the county court to one vote. No doubt the lawmakers assumed the members of the meeting would be so interested in the welfare of the district that they would not permit rivalry between the county court and the city council to interfere with the honest performance of their duty. Each member of the meeting is authorized to participate in the appointment, and, absent a word in the statute to the contrary, we must hold each member of the meeting to have a vote. The statute so remained for twenty years and until 1915, when the following proviso was added: 'Provided that where the city is located a greater distance than ten miles from the meeting place of the county court; the mayor and city council of the city or town within the road district for which commissioners are to be appointed; the mayor and members of the city council may make a written certificate of their choice of a commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger; and the choice and selection designated in such certificate shall be given the same con-

sideration as though the board and mayor were present at the meeting of the court: Provided that such certificate shall be given over the signature of the mayor or acting mayor, attested by the seal of the city and signature of the city clerk.' Laws of 1915, p. 375.

"It is clear the lawmakers by this proviso only intended to relieve the mayor and councilmen from attending the meeting if the city was located more than ten miles from the meeting place. By the proviso, the city is not authorized to make a written certificate of its choice, but the mayor and members of the council are authorized to do so. The choice designated in the certificate must be given the same consideration as though the mayor and members of the council were present. We have ruled the statute as originally enacted authorized each member of the meeting to cast a vote; and, if the choice designated in the certificate is to be given the same consideration as though a member was present and voting, then his choice designated in the certificate must be counted as a vote for commissioner. The requirement that the first, second, and third choice be designated has reference to the first meeting after the organization of the district, when three commissioners are to be appointed. Thereafter, at a meeting for the appointment of only one commissioner, the first ballot might not result in an appointment; if so, on the second ballot the absent member's second choice could be voted, and so as to his third choice."
(Underscoring ours.)

Section 10802 R. S. Missouri, 1919, is now Section 8675 R. S. Missouri, 1939.

The court in the above case described how the meeting should be held, and that the members of the city were each entitled to a vote, and were not confined to the city casting only one vote. The city in this case is analagous to the town in the case described in your request. The court also, in the above case, in passing on the provision that the town board may send in the vote, properly certified by written certificate, of their choice for road commissioner or road commissioners, specifically stated, "it is clear the lawmakers of this proviso only intended to relieve the mayor and councilmen from attending the meeting if the city was located more than ten miles from the meeting place."

Under your request you state that the town of Wayland is less than one-half mile under ten miles from Kahoka, the county seat where the meeting should be held, and under the holding in the above case the town board of Wayland is not permitted to mail in its choice properly certified, but the members who vote must appear in person at the meeting, which is supposed to be held in February of each year.

CONCLUSION

It is, therefore, the opinion of this department, that since the town of Wayland is less than ten miles from the city of Kahoka, which is the county seat, the town board of Wayland is not permitted to take advantage of the proviso which permits it to send in its choice as to whom should be appointed road commissioners by a written certificate to the county clerk by mail or special messenger.

Honorable Sears Jayne

-10-

February 11, 1943

It is further the opinion of this department, that each member of the town board is entitled to vote his choice for the road commissioner, or road commissioners, if voting at the meeting in the courthouse, which is properly called and presided over by the presiding judge of the county court and a record of which is made by the county clerk.

It is further our opinion, that the resolution passed by the town board of Wayland, constituting five votes for a certain party for road commissioner, is invalid and the votes must be cast in person at the courthouse at the meeting which must be held in February of each year.

It is further the opinion of this department, that if Charles Fore received a majority of the votes cast by the county court and the members of the town board, on February 8, 1943, at the courthouse in Kahoka, he has been legally appointed commissioner for the Wayland Special Road District.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELECTIONS: Eight questions concerning the selection of delegates to the Constitutional Convention.

February 12, 1943.

2-18



Honorable Floyd E. Jacobs
Attorney at Law
1115 Commerce Building
Kansas City, Missouri

Dear Mr. Jacobs:

The Attorney-General wishes to acknowledge receipt of your letter of February 10th in which you request an opinion of this Department. Your request, omitting caption and signature, is as follows:

"The Sheriff of this county received from the Governor on yesterday writ of Election relating to the election of delegates to the Convention to revise and amend the Constitution, providing that it be held on Tuesday, April 6, 1943, and commanding the Sheriff to issue his proclamation or notice for holding the election accordingly, giving ten days' notice thereof, and that he certify to the Governor the execution of this writ, and how he executed same.

"Section 4, Art. XV of the Constitution of Missouri, provides that when the people of the State vote for a constitutional convention, the Governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates, and the assembling of such convention, as is provided in Section 3 of Art. XV.

"In the latter Section of the Constitution, it is again provided that the Governor shall issue writs of election to the

Sheriffs of the different counties, ordering the election of delegates to the convention, and providing the time within which the Governor shall issue such writs.

"The question we have in mind is whether or not the Sheriff should issue the proclamation commanded in the writ. In Kansas City, there is a Board of Election Commissioners, and likewise another Board of Election Commissioners covering the balance of Jackson County outside of Kansas City.

"In the Writ of Election issued by the Governor to the Sheriff, he commands the Sheriff to issue the proclamation giving 'ten days' notice thereof.' There is no such provision in the Constitution relating to constitutional conventions, but in Section 11492 Rev. Stat. 1939, there is a provision that when the Governor issues a writ of election to fill any vacancy, he shall mention in such writ how many days, to be not less than ten, within which the Sheriff shall give notice thereof.

"Likewise, in Section 12110 Rev. Stat. 1939, it is provided in elections in cities the size of Kansas City, that it shall be the duty of the Board of Election Commissioners, to give ten days' notice in two daily newspapers of the time and the place of the election, etc.

"We would like to get from you an opinion as to whether or not the Sheriff under the Writ heretofore mentioned, shall issue his proclamation with respect to this election of delegates to a constitutional convention. This provision of the Constitution has been acted on once before, about twenty years ago,

but we do not know whether the Sheriff issued his proclamation, or whether it was done by the Boards of Election Commissioners, of this city.

"We would greatly appreciate an opinion from you on this matter in behalf of the Sheriff."

The Writ of Election issued by the Governor to the Sheriffs of the several counties, omitting non-essential elements, provides as follows:

"I, Forrest C. Donnell, Governor of the State of Missouri, do issue this writ of election and do hereby order that the election of delegates to the convention to revise and amend the Constitution be held on Tuesday, April 6, 1943, and that you issue your proclamation or notice for holding the election accordingly, giving ten days' notice thereof; and that you certify to me the execution of this writ, and how you executed the same."

This writ of election is required by Section 3, of Article XV, of the Constitution of Missouri, which in part reads as follows:

"* * *, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates to the convention, on a day not less than three nor more than six months after that on which said question shall have been voted on. * * *"

Along this line we would also like to cite you Section 4, of Article XV, of the Constitution of the State of Missouri, which provides as follows:

"The question 'Shall there be a convention to revise and amend the Constitution?' shall be submitted to the electors of the state at a special election to be held on

the first Tuesday in August, one thousand nine hundred and twenty-One, and at each general election next ensuing the lapse of twenty successive years since the last previous submission thereof, and in case a majority of the electors voting for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates, and the assembling of such convention, as is provided in the preceding section."

It will be seen from these two provisions of the Constitution that the writ in question is specifically addressed to the sheriff and calls for him to issue his proclamation in a certain manner. The writ further specifies that the sheriff shall certify to the Governor that the writ has been executed and the manner in which this was done. It is our opinion that where a condition such as this exists, that it is the duty of the sheriff, and his alone, to make the proclamation as provided.

The proclamation is merely a notice to the public generally that an election is to be held on a day certain for the purpose of selecting delegates to a constitutional convention. This is clearly not the statutory duty of the Election Commissioners in Kansas City, for, if such were true, it would be in violation of the Constitution of this State.

Section 3, of Article XV, of the Constitution of Missouri, further provides that after the proclamation by the sheriff that the nominations for delegates shall be made in a certain manner and that after such nominees are selected, certificates of elections shall be filed with the Secretary of State not less than thirty days before the election.

Supplementing Section 3, of Article XV, of the Constitution of Missouri, is Section 11683, R. S. Mo. 1939. This section provides as follows:

"Whenever an election shall be called to elect delegates to a constitutional

convention or an election called for the purpose of ratifying a submitted new Constitution, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions were submitted at a general election; except, that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and the next highest number of votes for governor at the last general election: Provided, however, that in all cities and counties of this state where registration of voters is now or may be provided for by law, elections under the provisions of this section shall be held in accordance with the provisions of law now in effect, applicable to the holding of elections in said cities and counties, and the county committee of each political party which at the general election for governor held next preceding any special election to elect delegates to a constitutional convention or for ratification of a new Constitution, cast at least ten per cent of all the votes cast at such election for governor in such city and county, shall appoint three judges and one clerk outside of such city for election under the provisions of this section, and in all such cities the judges and clerks of elections regularly appointed or that may be hereafter appointed and commissioned for regular state and county elections shall act as judges and clerks of all special elections under the provisions of this section. All acts or parts of acts inconsistent with the provisions of this act are hereby declared inapplicable to elections called for the purpose herein provided for."

As will be seen from reading this statute, the election shall be conducted in the same manner as is provided for general elections. Of course, this statute cannot conflict with the Constitution, but can be used only to supplement it.

Consequently, we will next cite you again to a portion of Section 3, of Article XV, of the Constitution of Missouri, in which the duties of the Secretary of State are set out. This reads as follows:

"* * * Not less than fifteen days before the election, the secretary of state shall certify to the county clerk of the county the name of each person nominated for the office of delegate from the senatorial district in which the county, or any part of it, is included, and the names of all persons nominated for delegates-at-large. * * *"

The above section sets out the duties of the secretary of state, and Section 11542, R. S. Mo. 1939, sets out the duties of the clerk of the county court, which said latter section prescribes the following:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election: Provided, that no higher rates shall be paid per inch, than is provided by section 14966, chapter 119, R. S. 1939, as amended."

Now, as to the duties of the Election Commissioners in Kansas City, we will call your attention to Section 12097, R. S. Mo. 1939, which in part is as follows:

"* * * Upon the appointment of such commissioners, the county clerk of the county in which such city is situated, and the board of election commissioners or other custodians of said property shall, upon demand, turn over to such board of election commissioners all registry books, poll books, tally sheets and ballot boxes, heretofore used, and all other books, forms, blanks, stationery and property of every description in any way relating to registration or election, or the holding of elections, within said city. Said board of election commissioners shall make all necessary rules and regulations, not inconsistent with this article, with reference to the registration of voters and the conduct of elections; and shall have charge of and make provisions for all elections, general, special, local, municipal, state, county, all primaries, and of all other of every description, to be held in such city or any part thereof, at any time. The board, in addition to the other powers expressed in this article, shall have full power and authority to direct judges and clerks as to their duties in relation to election and the laws relating thereto and to compel compliance therewith; and two of the commissioners of opposite political parties shall have the power on any day of election, to remove any judge or clerk, who, in their opinion, is failing to perform his duty; * * * * *

This statute clearly gives the Board of Election Commissioners full control over all elections in Kansas City, except as may be provided by the Constitution. Therefore, in certifying the names of the nominees for delegates to the

Convention, the Secretary of State should certify them to the Board of Election Commissioners of Kansas City and to the Board of Election Commissioners of Jackson County, instead of the County Clerk of Jackson County.

Section 12110, R. S. Mo. 1939, provides for the notice to be given by the Board, and is as follows:

"It shall be the duty of such board to give ten days' notice in two daily newspapers of such city, of opposite politics if possible, of the time and place of election in each precinct of the city, of the date of the close of registration and of the times and places of registration outside of the main office. The board is also authorized to prepare and, in its discretion, post notices of the times and places of registration outside of the main office."

Following this statute, when the Board receives the certificate of the Secretary of State, it shall then follow this section and give the notice as prescribed.

In the case of vacancies occurring in the General Assembly of this State, Section 14, of Article IV, of the Constitution of Missouri, provides:

"Writs of election to fill such vacancies as may occur in either house of the General Assembly shall be issued by the Governor."

It will be noted that in this instance, the Constitution merely provides that the writs of election shall be issued by the Governor, not specifying to whom they shall be issued. There would be a different procedure followed in that case, but in our instant question the Constitution specifically states that the writ of election shall be issued to the sheriffs of the counties.

II.

Under the instructions as given in the Writ of Election, the sheriff is to give "ten days' notice." The question arises as to whether this means ten days before the election or ten consecutive days.

Referring again to Section 3, of Article XV, of the Constitution, we see that the certification of nomination must be in the hands of the secretary of state at least thirty days prior to the day of the election. This being the case, the term "ten days' notice" could not possibly be ten days before the election, since, if the sheriff waited until that time, there would not be sufficient time remaining to certify the names of the nominees to the secretary of state.

Under Section 12861, R. S. Mo. 1939, which deals with vacancies in the General Assembly and writs of election to call elections to fill such vacancies, we find the following:

"The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election; and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

As can be seen from this statute, in a situation somewhat similar to the instant one, the sheriff shall "cause copies of such notice to be put up." This statute of course has reference to a special election, and in view of the fact that the writs in this kind of matter and also the writs of election are directed to the sheriff, calling for a proclamation, we believe that the proclamation in our instant case should be posted for at least a ten-day period.

However, it is common knowledge that more people would see a proclamation of this type in a newspaper publication than would see the proclamation posted by the sheriff in public places. Especially is this true in the areas where there is a dense population. Therefore, it would possibly be the best practice to post copies of such proclamation as directed by Section 12861, R. S. Mo. 1939, and also publish such proclamation in the newspapers.

III.

The next question to be considered is the proper form for the sheriff's certificate to the Governor, as required under the Writ of Election. There is no statutory form provided, but we suggest it be made in the following manner:

Certificate

This is to certify that I have this ____ day of _____, 1943, executed the Writ of Election directed to me by Honorable Forrest C. Donnell, Governor of the State of Missouri, by issuing my proclamation or notice for holding an election for the selection of delegates to a Constitutional Convention, said election to be held on April 6, 1943, by posting copies of such proclamation or notice of election in _____ County in the following public places _____

_____ for 10 days, and by publication of such proclamation in _____ and _____, newspapers published in said County of _____, State of Missouri.

Given under my hand this ____ day of
_____, 1943.

Sheriff of _____ County.

IV.

Another question to be considered is as to who shall select the judges and clerks of election and how they are to be notified.

Section 11683, R. S. Mo. 1939, in speaking of this matter, prescribes as follows:

"Whenever an election shall be called to elect delegates to a constitutional convention or an election called for the purpose of ratifying a submitted new Constitution, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions were submitted at a general election; except, that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and the next highest number of votes for governor at the last general election; Provided, however, that in all cities and counties of this state where registration of voters is now or may be provided for by law, elections under the provisions of this section shall be held in accordance with the provisions of law now in effect, applicable to the holding of elections in said cities and counties, and the county committee of each political party which at the general election for

governor held next preceding any special election to elect delegates to a constitutional convention or for ratification of a new Constitution, cast at least ten per cent of all the votes cast at such election for governor in such city and county, shall appoint three judges and one clerk outside of such city for election under the provisions of this section, and in all such cities the judges and clerks of elections regularly appointed or that may be hereafter appointed and commissioned for regular state and county elections shall act as judges and clerks of all special elections under the provisions of this section. All acts or parts of acts inconsistent with the provisions of this act are hereby declared inapplicable to elections called for the purpose herein provided for."

This section provides that when an election is called to elect delegates to a constitutional convention, that said election shall be conducted in the manner provided by law for general elections. In view of the fact that there are no other special provisions pertaining to this matter, this statute will govern. It will be seen that said election shall be conducted by "two judges and two clerks at each polling place." There is also a provision as to the selection in cities and counties where registration of voters is in force.

Following the foregoing statute, the county courts of each county shall select the proper number of judges, except in those cities and counties where the registration law is in effect. In such cases the judges and clerks are selected by the political parties which at the preceding general election cast ten per cent of the votes cast at such election for Governor. However, in cities and counties where there is a Board of Election Commissioners, such Board discharges the duties of the selection of judges and clerks.

The judges and clerks of election are then notified of their appointment in the same manner as if it was a general election.

Since Section 11683, supra, provides that the election is to be conducted in the same manner as provided by law for general elections, the ballots for such elections shall be furnished by the respective clerks of the county courts. Sections 11593 and 11594, R. S. Mo. 1939, provide as follows:

(11593)

"All ballots cast in elections for public officers within this state shall be printed and distributed at public expense, as hereinafter provided. The printing of the ballots and of the cards of instruction for the electors in each county, and the delivery of the same to the election officers, as provided in section 11598, shall be a county charge, except where the officers to be voted for are exclusively city officers, in which case such printing and delivery shall be a city charge, the payment of which shall be provided for in the same manner as the payment of other county or city expenses."

(11594)

"Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. Ballots other than those printed by the respective clerks of the county courts according to the provisions of this article shall not be cast or counted in any election."

The election shall be conducted relative to reports to county courts, supplies, ballots and returns, in the same manner as general elections. This would also apply as to the time of opening and closing the polls.

V.

A suggested form to be used by the sheriffs of the various counties, for the "Proclamation of Election," is as follows:

PROCLAMATION OF ELECTION

Under the authority of the writ of Election directed to me by Honorable Forrest C. Donnell, Governor of the State of Missouri, I hereby proclaim that on April 6, 1943, there shall be an election held in _____ County, for the purpose of electing delegates to the Constitutional Convention, said Constitutional Convention to be convened by proclamation by the Governor of the State of Missouri on a date within six months after the election of such delegates, at the seat of government of the State of Missouri.

Given under my hand this _____ day of _____, 1943.

Sheriff of _____ County,
Missouri.

VI.

Another consideration is whether the election judges and clerks can be used for both the school election and the election for delegates to the Constitutional Convention.

The conduct of the election of delegates for the Constitutional Convention is conducted in the same manner as

that of general elections, as provided by Section 11683, R. S. Mo., 1939. There is one exception to this and that is the number of judges to be used in such elections. This matter is treated supra.

In the case of the annual school elections and the election of the county superintendent of schools, such elections are not conducted in the manner of general elections. There is no provision for judges in the annual school election in the rural communities. Further, in the case of the county superintendent of schools, there is no provision as to the proper party to pay for the ballots. Also, the persons in attendance at the annual school elections vote for the county superintendent of schools if he happens to be up for election at that time. In the cities, in such elections, there are judges used in some instances. However, a study of the procedure and conduct of the annual school meeting and election of the county superintendent of schools, shows that such elections are held in a rather informal manner. We do not feel that the election of delegates to the Constitutional Convention should be held in an informal manner in the light of the constitutional provisions and statutes pertaining thereto, and that such election should be held separate and apart from the other elections. The county pays the expenses of the Constitutional Convention election and the expenses of the other elections should be paid as they have formerly been, and the procedure and conduct should be the same as formerly but separate and apart from the Constitutional Convention election.

VII.

The further question has been asked as to whether it is necessary for the voters voting for delegates to the Constitutional Convention to be registered in view of the fact that it is not necessary that they be registered to vote in a school election or for county superintendent of schools. This inquiry was made, setting out the City of Hannibal as being the city to which this question referred.

This question can be answered by a reading of Section 11683, R. S. Mo. 1939, which provides in part as follows:

"* * * Provided, however, that in all cities and counties of this state where registration of voters is now or may be provided for by law, elections under the provisions of this section shall be held in accordance with the provisions of law now in effect, * * *"

As can be noted from reading the above provision, in the case of an election for delegates to the Constitutional Convention, the voters voting for such delegates must be registered in the city and counties where the registration law is in effect.

VIII.

Further inquiry has been made as to whether it is necessary that the gummed sticker be used in connection with the election of delegates to the Constitution Convention and in the election of county superintendent of schools.

As stated above the election of the delegates to the Constitutional Convention is conducted in the manner provided by law for a general election as specified in Section 11683, R. S. Mo. 1939. The statute relative to the gummed sticker being placed over the ballot number, will be found in Laws of Missouri, 1941, at page 363, Section 11607. This section provides as follows:

"Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths (3/8) of an inch towards the center of the square, so as to conceal but not destroy,

the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the County Clerk or Board of Election Commissioners of each county or city, and no sticker shall be removed except in case of contested elections, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

In view of the provisions of Section 11683, R. S. Mo. 1939, and Section 11607 of the Laws of Missouri for 1941, it is our opinion that the gummed sticker shall be used in connection with the election of delegates to the Constitutional Convention.

In answer to the question of whether the Australian ballot, which is used in general elections, or the ribbon ballot, which is used in primary elections, shall be used in the election of the delegates to the Constitutional Convention, we will again call your attention to Section 11683, which has been cited several times in this opinion, and which provides that the election to elect delegates to a Constitutional Convention, shall be conducted in the manner provided by law for general elections. Therefore, it would appear that the regular ballot used at general elections shall be used.

Conclusion.

Therefore, it is the opinion of this Department that:

(1) The writs of election issued by the Governor of the State of Missouri to the sheriffs of the various counties in this State, shall be executed by the said sheriffs of the various counties, including Jackson County, who shall issue proclamations or notices of election as called for in such writs of election.

(2) A proclamation or notice of election to be issued by the sheriff shall be posted in public places in the respective counties and by publication if such be desired.

(3) The judges and clerks who shall conduct the election for the purpose of the selection of delegates to the Constitutional Convention, shall be selected in the same manner as for general elections, except that the number shall be less as provided by Section 11683, R. S. Mo. 1939.

(4) The furnishing of supplies and all other matters pertaining to the election where such delegates shall be selected, shall be handled and conducted in the same manner as for general elections.

(5) The election to select delegates to the Constitutional Convention shall have judges and clerks appointed for that purpose alone and the conduct of such election shall be separate and apart from the conduct of an election for the election of a county superintendent of schools and other annual school elections.

(6) It is necessary in counties and cities where the registration of voters is in effect, that all persons attempting to vote at the election called for the purpose of selecting delegates to the Constitutional Convention shall be registered.

(7) The gummed stickers to be placed over the ballot numbers, as provided by Section 11607, Laws of Missouri, 1941, at page 363, shall be used on Constitutional Convention ballots,

but such provision does not apply to school elections and it is not necessary that the gummed stickers be used on ballots used in the election of a county school superintendent or for any other school election.

(8) The form of the ballots to be used in the election for the selection of delegates to the Constitutional Convention shall be in the same form as provided by the general election laws of the State of Missouri.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

February 18, 1943

Mr. T. Victor Jeffries
Supervisor, Bureau of
Building and Loan Supervision
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of February 9, 1943, on a matter submitted by the Secretary of the Postal Employees Building, Loan & Savings Association of St. Louis, Missouri. The question is how shall directors of a Building and Loan Association be elected.

We are not familiar with the by-laws of the above building and loan association. However, this is not important for the reason said by-laws cannot exceed the constitution and statutes pertaining to said election and if they do, said by-laws are invalid. Sundheim, Third Edition, Building and Loan Associations, Section 91, page 90, lays down the general rule as to voting for directors in such associations and holds that constitutional and statutory provisions relating to the right of stockholders to vote in corporations generally applies to building and loan associations unless they are expressly excepted and when such right is regulated by constitution or statute a by-law cannot change same.

"The right to vote stock at corporate elections is an incident of ownership, to be exercised, of course, in the mode, and under the restrictions, prescribed by the constitution, and the statutes of the state, and the charter and by-laws of the association. Constitutional provisions and statutes regulating the right to vote in corporations generally apply to building and

loan associations, unless they are expressly excepted, and when the right to vote is regulated by statute, it cannot be changed by by-law or resolution. When the general law expressly declares who shall be entitled to vote, and how they shall vote, its provisions are controlling, and a by-law in conflict therewith is void. Therefore a by-law limiting the right to vote to stock a year old is invalid, when in conflict with a statute which gives a right to vote to each member."

Section 8207, R. S. Missouri 1939, provides by-laws of such corporations as building and loan associations may adopt by-laws but same shall not be inconsistent with the constitution and laws of this State. Said section reads in part:

"The shareholders of such corporation may make and adopt all necessary by-laws for the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state. * * * * *

* * * * *

Section 8208, R. S. Missouri 1939, provides by-laws may be adopted for certain purposes and may prescribe the qualifications of directors of said association or corporation. Said section reads in part:

"The number, title and functions of the officers of any corporation created by virtue of this or any previous law, their terms of office, the time of their election, as well as the qualification of electors, and the time of each periodical meeting of the officers and shareholders of such corporation, shall be provided for in the by-laws. No person shall be eligible to become or shall continue a director unless he shall be the owner of at least five shares of capital stock of such corporation, and not delinquent in any manner thereon. * * * * *

Section 5007, R. S. Missouri 1939, provides the method, which we believe is applicable in the instant case, of electing candidates of a corporation, and reads:

"In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares of stock so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election, and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute them among two or more candidates; and such directors or managers shall not be elected in any other manner."

Section 6, Article 12 of the Constitution of the State of Missouri provides the procedure which is applicable to the election of directors of any incorporated company, and reads:

"In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner."

Sundheim, supra, Section 93, page 92, provides that in order to secure minority representation on the board of directors some jurisdictions confer the right of cumulative voting:

"In order to secure minority representation on the board of directors, the constitution, or statute law, or both, of

some jurisdictions confer the right of cumulative voting. These provisions apply to buidling and loan associations, and no notice of an intention to cumulate votes need be given."

In an old decision not overruled, *Tomlin v. The Farmers & Merchants Bank*, 52 Missouri Appeal Reports 430, l. c. 434, the court held the cumulative plan of voting on directors is authorized by the constitution, namely, Section 6, Article 12, *supra*, and in so holding the court said:

"* * * * * The cumulative vote by stockholders is authorized by the constitution and laws of this state. Constitution, art. 12, sec. 6; Revised Statutes, 1889, sec. 2490. By that plan the stockholder may cast a number of votes equal to the number of shares held by him multiplied by the number of directors to be voted for, and he may distribute the total of such vote as he may desire, among the directors to be elected. As stated by the supreme court of Pennsylvania, speaking of a similar provision, in *Pierce v. Commonwealth*, 104 Pa. St. 154: 'This section to us seems very plain and unambiguous. If there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast those six votes for a single one of the candidates, or he may distribute them to two or more of such candidates as he may think proper. He may cast two ballots of each of three of the proposed directors, three for two, or two for one and one each for four others, or, finally, he may cast one vote for each of the six candidates.'"

In the above case a resolution was introduced and passed which required them to proceed to elect thirteen directors, each shareholder under the resolution to be entitled to one vote for

each share, to vote for thirteen different directors, and the thirteen receiving the highest number and a majority of the shares to be duly elected, which resolution was not in compliance with the cumulative plan. In discussing the legality of said resolution the court said:

"* * * * * The question then is, is such resolution contrary to the letter, spirit and intention of the constitution and statute on the subject of such elections and the rights of stockholders? A reading of the resolution and the law is a full answer to the question. They are in direct antagonism. The further question then occurs, can a majority of of the stockholders of a corporation control the law as to the corporation, or place it in abeyance? The answer to this is evident from the mere statement. The right is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder, it can be exercised or not by such stockholder as he may himself elect. *Pierce v. Commonwealth*, 104 Pa. St. 155. It, therefore, cannot be taken from him by a resolution or by-law adopted by a majority of shareholders."

Therefore, it is well settled in this State that such an election should be held under the cumulative plan as provided in the Constitution and statutes of the State of Missouri. That is, that each member may cast as many votes as shall equal the number of shares of stock so held by him, multiplied by the number of directors to be elected and the total sum may be cast for one or more candidates.

In *Tomlin v. The Farmers and Merchants Bank*, supra, while the court did not specifically determine just what should be done, it did imply that no new election was necessary but that the successful candidate receiving the majority of votes under the cumulative plan should be seated instead of the candidate that was seated by receiving a majority of votes under the system instituted contrary to the cumulative plan, the court said:

"* * * * * It is, however, held in New Jersey, under a statute substantially

February 18, 1943

like ours, that if the legal votes rejected were, together with those cast for the complaining party, a majority of the total outstanding stock of the corporation, no new election would be ordered, and the complainant would be seated. 1 Beach on Private Corporations, sec. 302; In re Cape May & D. B. N. Co. (1889), 15 Atl. Rep. 191; In re Steamboat Co., 44 N. J. Law, 529. The language of the latter case would seem to authorize the installation of a complainant, in some instances where justice seemed to demand it, who had a majority of legal votes counting those cast and tendered, although they were short of a majority of the total stock outstanding."

If the record fails to disclose how shareholders in the association voted under the cumulative plan then it will necessitate another election to comply with the statutes and the Constitution which requires directors be elected under the cumulative plan as hereinabove described.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

ARR:EAW

BUILDING AND LOAN: Building and Loan Supervisor may under certain conditions request court to escheat certain funds to the State of Missouri.

June 1, 1943

6-7



Mr. T. Victor Jeffries
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, under date of May 25, 1943, which reads:

"In the days of depression many building and loan associations segregated their assets which resulted in the good assets being sold into a good institution and the bad assets being listed as "B" Accounts and put in charge of trustees to liquidate.

"Now it has developed that most of these "B" Accounts have been converted to cash and are now to the closing stages of liquidation. Final distribution to the shareholders is now in order. Many of the shareholders have unknown addresses and also, because of the fact that their accounts are so small, their certificates will never be turned in for cancellation and receive their proportional part.

"These trustees are usually well compensated for their services and in most instances have an attorney as their adviser, who receives ample compensation for his services and naturally, they do not encourage a fast method of liquidation because it would take away some of their means of making a living.

"I can't see why there should be any delay at all after the assets have been turned to cash in making an immediate liquidation. I think the following suggestions I have made are legal and wish an opinion from your department as to the legality and also an idea of the expense that your office would incur in going into Court for a court order for the deposit of the unclaimed balances into the Escheat fund.

"It has been my suggestion that the trustees pass a resolution turning the assets of the trust over to the State Department for liquidation. When that is done, I will employ some person to make distribution, that is, put out letters asking for the return of their certificates so that checks might be sent out for final payment. After a reasonable time then, have your office file a petition in Court, asking for a court order that all money left, be turned over to the Escheat fund of the State.

"At a glance you can see what a savings this would mean to the shareholders and no doubt, they would be more pleased to have their final liquidation carried out by a State Department assisted by your office, than they would be by persons who are more or less interested in handling the trust for what they can get out of it.

"We are going to have several of these, so your immediate attention to the above, will be greatly appreciated."

You refer to certain bad assets listed as "B" Accounts and put in charge of trustees to liquidate, the balance of good assets having heretofore been sold. We are assuming, for the purpose of this opinion, that such refers to a voluntary liquidation wherein no court proceedings have been instituted; that such trustees are appointed by the Board of Directors of the respective building and loan companies under and by virtue of authority vested in them under Section 8210, R. S. Missouri 1939, and their respective by-laws. Section 8210, supra, reads in part:

"* * * * * And any building and loan association shall have the power to provide in its by-laws for the creation and establishment from time to time of a 'participating reserve fund', in which may be placed any or all real estate owned by the association and any loans and/or other assets of doubtful value, the same to be selected by the board of directors, the book value of the assets in said reserve fund to be apportioned pro rata in reduction of the book value of the stock of the association then outstanding, subject to the approval of the supervisor of building and loan associations. Such reserve fund shall be and remain a separate fund from the other assets of the association to be liquidated and shall be represented by a class of stock to be known as 'participating reserve shares', of the association to be issued to those stockholders of the association pro rata, the book value of whose stock has been reduced by the creation of such reserve fund. In the liquidation of said reserve fund all the proceeds from the sale of said real estate or collection or liquidation of said loans or other assets shall be paid to the holders of said participating reserve shares, at such times as the board of directors shall determine. All losses, if any, that may occur in said reserve fund shall be absorbed by the holders of said participating reserve shares. The association, if so provided by by-law, may transfer and/or convey title to the assets in said reserve fund, or any part thereof to three trustees selected by the board of directors, who may be officers of the association, under a trust agreement defining the powers and duties of the trustees, who may issue 'participating reserve certificates', instead of 'participating reserve shares', to said stockholders entitled thereto, as provided above, giving all the rights and subject to all the liabilities herein provided as to 'participating reserve shares'. And upon the surrender to the association of the outstanding stock in the hands of a member of such association there shall be issued to such member new stock certificates of the association evidencing the reduced value of the stock surrendered, and in addition to such new stock certificates the reserve shares or reserve certificates to

which such member is entitled, as above provided. Such reserve shares or reserve certificates issued to a borrowing member who had his stock up as collateral for a loan shall be pledged as additional collateral for such loan, and the borrowing member shall continue to make installment payments on his loan, as provided in the note or bond and deed of trust securing said loan, and upon payment of the loan in full the directors may apply as a credit on the loan the then value of the reserve shares as determined by the board of directors, after taking into consideration any estimated losses sustained in such reserve fund. In making reports and statements to the supervisory department of the state, the value of such a reserve fund undistributed shall be included as a part of the assets of the association and be classified as 'participating reserve fund': * * * * *

The facts in the instant case apparently leave nothing further for these building and loan associations to liquidate except to see that a proper disposition is made of the money received from the sale of class "B" Accounts. You suggest that the Board of Directors of these loan companies now adopt a resolution to turn over to you as Supervisor of the Bureau of Building Loan Supervision the money now being held by them from sale of "B" Accounts for distribution to proper parties and if you are unable to locate persons entitled to receive said money, or such persons refuse or fail to turn in their certificates for cancellation within a reasonable time, then you suggest this Department shall file a petition in circuit court asking that the court order all such money unclaimed be turned over to the escheats fund of the State of Missouri.

This Department, under date of October 31, 1941, rendered an opinion to the Honorable Wilson Bell, Treasurer of the State of Missouri, wherein it was held that a voluntary dissolution of a corporation in this State did not constitute proceedings in or before the courts in this State and therefore Section 620, R. S. Missouri 1939, of the escheats statutes did not apply, that Section 620, supra, contemplated only proceedings in a court. It has been held that a building and loan association, while peculiar in its features is, nevertheless, a business corporation. (See Woerheide v. Johnston, 81 Mo. App. 193.) The facts herein likewise do not contemplate any court procedure to date. The appointment

of the present trustees was by the Board of Directors and not by a court. Therefore, such escheat provisions which are strictly statutory are not applicable in the instant case. However, as held in the opinion above mentioned, even though Section 620, supra, was not broad enough to cover such funds, which funds may still escheat to the State under the Constitution of Missouri as unclaimed dividends. In view of the opinion hereinabove referred to dealing with this same matter, it would be mere repetition for the writer to include the reasons and law in support of the proposition that such funds do not come within the purview of Section 620, supra, relative to funds being placed into the escheat fund of the State of Missouri, but that said funds do escheat under the Constitution, namely, Section 6, Article XI, declaring that unclaimed dividends shall be paid into the State Treasury, and securely invested and sacredly preserved as a public school fund. Therefore, we refer you to the foregoing opinion, which we consider applicable in this instance, and a copy of which we are attaching hereto.

Section 8248, R. S. Missouri 1939, specifically authorizes the Supervisor of the Bureau of Building and Loan Supervision to assume control under certain conditions and it is the opinion of this Department that under such circumstances as stated in your request, the Directors of such building and loan associations may direct you as Supervisor of the Bureau of Building and Loan Supervision in this State to take over and manage the affairs of said building and loan associations. Section 8248, supra, reads in part:

"No association shall cease to do business or attempt to make a voluntary assignment of its assets or in any other manner to liquidate its affairs prior to the maturity of all its stock, except with the consent of two-thirds of its stockholders and the approval of the supervisor of building and loan associations as hereinafter provided. If any association attempts to make such an assignment, the supervisor shall upon his own initiative take charge of the association and of its assets and shall manage and conduct its business. Or if it shall appear to the supervisor from any report of such association or from any examination made or caused to be made by him, or from any knowledge or information obtained from any other source, that such association has committed a violation of its charter or is acting unlawfully, or that such association is conducting its busi-

June 1, 1943

ness in an unsafe or unauthorized manner, or that the assets of any such association are insufficient to justify the continuance of business by such association, or it shall appear to the supervisor that it is unsafe or inexpedient for any such association to continue to transact business, the supervisor shall communicate the fact to the officers or directors; such officers or directors shall be allowed sixty days in which to make the assets sufficient or to correct the illegal practices. In case such assets are not made sufficient, or the illegal practices corrected within a time fixed by the supervisor, or if the directors request the supervisor so to do, the supervisor shall take charge of the association and its assets and manage and conduct its business. * * * * *

There is only one reason why such procedure, before being executed, should be carefully considered and that is, that the statutory provisions, Sections 623 and 624, R. S. Missouri 1939, permitting the rightful owners to apply for said money within twenty-one years thereafter and receive same, does not apply in the case of this escheat under the Constitution. However, we think the General Assembly would not turn a deaf ear and would reimburse any claimant who, within a reasonable time after said fund escheats to the State, files his claim with the General Assembly.

Under Section 8250, R. S. Missouri 1939, it becomes the duty of the Attorney General to conduct such litigation. The costs of such litigation would be nominal. The only costs to this Department would be actual travelling expenses.

Therefore, it is the opinion of this Department that the Directors of such building and loan association may pass a resolution requesting the Supervisor of the Bureau of Building and Loan Supervision in this State to take charge of said associations, transferring said funds to him, and that he make every effort to distribute said funds to their rightful and legal owners and after every effort to do this has failed and they cannot be located within a reasonable time thereafter, he may go into court and request the

Mr. T. Victor Jeffries

-7-

June 1, 1943

court to order said fund to be paid into the State Treasury to the credit of the school fund, in conformity with Section 6, Article XI, of the Constitution of the State of Missouri.

Respectfully submitted

AUBREY F. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McRITTRICK
Attorney General of Missouri

ARH:EAW

Encl. 1

BUILDING AND LOAN: Not required to be custodian of records of liquidated building and loan associations.

July 14, 1943



Honorable T. Victor Jeffries
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 9, 1943, which reads as follows:

"We have in Missouri, stored in various real estate offices and federal associations, all the books and papers of former state chartered associations, which have completely liquidated and are no longer in existence. The storage of these books has become a problem to these various concerns and they want us here in the Department to bring the same to Jefferson City, for safe keeping. I can't see where there is much use in preserving all of those old records, either in the Department, or, where they are now located.

"Wish you would give me your opinion as to the responsibility of the Department in the preservation of these old records. If there is none, I am going to suggest that they all be destroyed."

Section 4465, R. S. Mo. 1939, makes it a felony for the destruction of any public record in any public office. Said section provides:

"Every officer or other person having the custody of any record, paper, document or proceedings, or any will, deed or other

writing, specified in either of the last two sections, who shall fraudulently take away, withdraw or destroy any such record, paper, document, proceeding, will, deed or instrument of writing filed or deposited with him, or left in his custody, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years."

Section 3622, R. S. Mo. 1939, requires that any officer shall deliver to his successor all records, books and papers pertaining to his office. Said section reads as follows:

"If any civil or military officer having any record, books, or papers appertaining to any public office or any court shall resign, or his office be vacated, he shall deliver to his successor all such records, books and papers."

Section 8201, R. S. Mo. 1939, requires the Supervisor of building and loan associations to preserve all records, reports and papers pertaining to the Bureau of Building and Loan Supervision, and provides:

"The supervisor of building and loan associations shall preserve all records, reports, and papers pertaining to the bureau of building and loan supervision and shall make a report in writing to the governor on or before the first day of December of each year, which report shall set out in detail the condition and work of the bureau during the year preceding and he shall make such further reports at any time that shall be required by the governor."

Section 8253, R. S. Mo. 1939, requires the Supervisor to keep other files and records, and reads as follows:

"The supervisor shall keep in his office, in addition to the register of dealers and

July 14, 1943

salesmen, orderly and sufficient files or records, with adequate indexes, of information received and orders and rulings made by him in pursuance or by authority of the provisions of this chapter, which register, files and records shall be kept open to public inspection at all reasonable hours, and exemplifications of which, under his hand and seal, shall be furnished by him, on request and on payment of the cost of preparing and transmitting the same, and shall be good and sufficient evidence of the original register, files or records so transcribed: Provided, however, that the supervisor shall have power to place in a separate file not open to the public, except on his special order, any information which he deems in justice to the person or building and loan association filing the same should not be made public."

Volume 53, C. J., Section 38, page 622, lays down a general principle that a public officer is responsible for the custody and care of public records, and reads in part as follows:

"A public officer, by virtue of his office, is the legal custodian of all papers, books, and records pertaining to his office, and is responsible for their safekeeping and protection against alteration, injury, or mutilation. Correlative with that duty is his right to exercise a reasonable discretion in the care, management, and control of such records and their preservation.
* * * * *

The writer notices that you mention in your letter that "We have in Missouri, stored in various places, etc. Surely you do not mean that these records are the property and public records of the Bureau of Building and Loan Supervision, but that such records must belong to the respective associations. If such records are, in fact, property belonging to the Bureau of Building and Loan Supervision, then, in the absence of any specific statute authorizing the destruction of such records

July 14, 1943

within a certain time, they must be preserved at all costs. Otherwise, if they are the property of the respective building and loan associations, which we believe is true, then this is not your responsibility.

We find no statute authorizing the Supervisor of the Bureau of Building and Loan Supervision to destroy any records. A public record has been defined as a written memorial made by a public officer who is authorized by law to make it. Also, all records which the law requires a public officer to keep, as such officer, are public records. See Section 1, Vol. 53 C. J., page 604.

Records pertaining to the public in many departments of the State may now be destroyed within a certain stipulated time as provided by statute. However, in the absence of such authorization it is necessary to keep all public records.

Conclusion

We are of the opinion that such records of said liquidated associations, having heretofore been kept by said associations and not in the office of the Bureau of Building and Loan Supervision, do not constitute such public records as are required to be kept by the Supervisor of Building and Loan Supervision. Therefore, it is the opinion of this department that you are not authorized to keep such records and are not liable for the safe keeping of same.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

ARH:EG

OFFICERS: Deputy Circuit Clerk is an officer and entitled to receive compensation while lawfully holding title to office.

January 8, 1943

Honorable Kelso Journey
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Mr. Journey:

Receipt is acknowledged of your letter of December 31, 1942, requesting an opinion from this office as follows:

"Will you please let us have your opinion, at the earliest possible date, on this question:

"John R. Wall was elected Circuit Clerk of Henry County in 1938 for a term of four years. Jessie L. Rucker was duly appointed as Deputy Circuit Clerk in 1938. Upon February 16, 1942, John R. Wall was inducted under the Selective Service Act into the Army of the United States as a private, and Jessie L. Rucker, as deputy circuit clerk, carried on the work of the Circuit Clerk's office until April 7, 1942, when she turned over the office to Wade Wilson, being a person appointed to the office of Circuit Clerk by the governor upon April 4, 1942, under threat of being held in contempt of the Circuit Court. Shortly after April 7, 1942, the Attorney General instituted a proceeding in quo warranto in the Supreme Court of Missouri to determine Wade Wilson's right to hold the office as Clerk of the Circuit Court of Henry County. The Supreme Court of Missouri in its decision entitled 'State of Missouri, ex inf. Roy McKittrick, Attorney General of the State of Missouri v. Wade Wilson', decided that there was no vacancy in the office of Circuit Clerk in Henry County and that the appointment of Wade Wilson was unauthorized. Upon December 14, 1942, Jessie L. Rucker took charge of the

office and is now carrying on the duties of same. For the period from April 7, 1942, to December, 1942, Jessie L. Rucker remained ready and willing to perform the duties of the office as the deputy circuit clerk of John R. Wall, and duly filed her demands for her salary. Is the County lawfully obligated to pay same?"

The authority for the appointment of a deputy clerk of the circuit court is found in Section 13299 R. S. Mo., 1939, which section is as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Section 13434 R. S. Mo., 1939, makes provision for the approval of deputy clerks by the Judge or Judges of the Circuit Court and authorizes the Judge or Judges to fix the compensation of such deputies. Section 13435 R. S. Mo., 1939, makes provision for the payment of the compensation to the deputies. This section is as follows:

"The salary of the clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The clerk and his deputies

January 8, 1943

and assistants shall present their accounts to the county court, and said court shall draw its warrant therefor upon the county treasurer, to be paid out of any money available in the treasury."

It is well established law in the State of Missouri that the compensation of the office is a mere incident to the office and the person who has title to the office is entitled to the compensation. Your attention is directed to the following cases:

Cavane v. City of Milan, 99 M. A. 372, is a case in which a marshal who was unable to perform his duties due to illness was permitted to recover the compensation attached to his office for the time he was absent from the performance of his duties.

In the case of Bates et al v. City of St. Louis, 153 Mo. 18, the mayor of St. Louis was permitted to collect the salary attached to the office of mayor for a period of time while he was absent from the State of Missouri on personal business and performing none of the duties of the mayor.

A similar case is the case of State ex rel. Chapman v. Walbridge et al, 153 Mo. 194. In this case a police officer of the City of St. Louis was allowed to recover compensation for a period of time during which he performed no duties because of being improperly relieved from duty. The following quotation is taken from this case at l.c. 203:

" * * The legal right to the office carried with it the right to the salary. The board by its wrongful act could not deprive him of this legal right. The right of a public officer to the salary of his office, is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actu-

ally rendered. (Givens v. Daviess Co., 107 Mo. 603; Gammon v. Lafayette Co., 76 Mo. 675; State ex rel. v. Carr, 3 Mo. App. 6; State ex rel. v. Brown, 146 Mo. 401; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Andrews v. Portland, 79 Maine, 484; Memphis v. Woodward, 12 Heiskell, 499; People ex rel. v. Smyth, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal. 193; Koontz v. Franklin Co., 76 Pa. St. 154; Walker v. Cook, 129 Mass. 579; Hoke v. Henderson, 4 Dev. (N. C.) 1; City Council v. Sweeney, 44 Ga. 463; People ex rel. v. Brennan, 30 How. Prac. Rep. 417.) Hence, the fact that the relator after he was wrongfully and without warrant of law discharged from his position as policeman, and was thereby and thereafter prevented from discharging the duties of that position, and did not in fact discharge those duties or offer to do so, affords no ground for denying him his salary, and the court committed no error in awarding him a mandamus therefor."

The foregoing would indicate that the deputy circuit clerk would be entitled to receive the compensation attached to the position if such position is to be considered as an office even though prevented from performing the duties of the office. A search of the statutes, textbooks, and cases has failed to reveal any direct holding in the State of Missouri as to whether or not a deputy circuit clerk should be considered as an office.

In the case of Horstman v. Adamson, 131 M. A. 119, a suit involving the compensation of a deputy clerk of the county court, the language used by the judge would indicate that a deputy clerk of the county court would be considered an officer. The deputy clerk of the circuit court occupies a similar position.

Further, in the case of State ex rel. v. Bus, 135

Mo. 325, at l.c. 332, a deputy sheriff was held to be a public officer in the following language:

"The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers."

There is quite a bit of similarity between the position of deputy sheriff and deputy clerk of the circuit court. Each deputy is appointed by his principal with the approval of the Judge or Judges of the circuit court. Each deputy must take an oath of office. Each perform certain duties in the name of the principal, and there is no fixed tenure of office for either.

In the Maryland case of *State to Use of Smith v. Turner*, 101 Md. 584, 61 A. 334, 337, it was specifically ruled that a deputy clerk of the court in Maryland is an officer of the court and not an agent:

"'Deputies,' being appointed in the language of the Constitution 'to perform the duties of the office,' are not mere servants or agents of the clerk of the court; they are agents and officers of the court."

Under the law of Maryland the deputy clerks are appointed by reason of the constitutional provision instead of under a statute as they are appointed in Missouri, but it is required that their appointment be approved by the Judge of the Circuit Court just as our statute requires the appointment of a deputy clerk to be approved by the Judge.

Hon. Kelso Journey

-6-

January 9, 1943

CONCLUSION

From the foregoing the conclusion is reached that a deputy clerk is a public officer, and as such is entitled to the compensation attached to the office while having lawful title to the office.

Respectfully submitted,

W. C. JACKSON
Assistant Attorney-General

APPROVED:

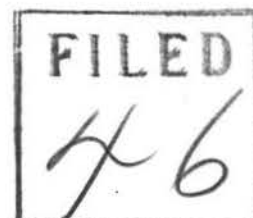
ROY McKITTRICK
Attorney-General

WOJ:FS

ELEEMOSYNARY INSTITUTIONS: Board of Managers may employ an "Executive Secretary" to work in central office at Jefferson City, Missouri, with reservations.

February 2, 1943

2-6
Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of January 21st, 1943, in which you request the opinion of this department. Your request reads as follows:

"At the request of the Board of Managers of the Eleemosynary Institutions, we are writing you for information.

"Has the Board of Managers the power to create an Executive Secretary and set the salary for same?"

For an answer to your question we must refer to the statutes of Missouri, which create a Board of Managers of the State Eleemosynary Institutions, to ascertain the powers and duties of such board.

The Board of Managers of the Eleemosynary Institutions of the State is created by Section 9259, R. S. Mo. 1939, which statute gives the board the care, management and control of the State Eleemosynary Institutions. This board, consisting of six men, is appointed by the Governor and is bipartisan, and one of their number is designated as president, who shall devote his entire time to the said institutions. (Section 9261, R. S. Mo. 1939.)

Under Section 9263, R. S. Mo. 1939, the Board of Managers shall have authority to make all necessary rules, regulations and by-laws for the government, discipline and management of each institution under its jurisdiction, not inconsistent with the laws of the state.

The statutes designate by name the various officers of the institutions under the management of the Board of Managers and fix their salaries. The president receives \$5,000 per annum under Section 9270, R. S. Mo. 1939. The health supervisor receives not exceeding the sum of \$5,000, per annum, to be determined by the board, under Section 9274, R. S. Mo. 1939. Under Section 9278, R. S. Mo. 1939, each of the various eleemosynary institutions shall have a superintendent, who shall receive, unless otherwise provided for, \$3600 per annum. The various institutions shall have physicians and assistant physicians, whose duties it shall be to administer to the wants and needs of the inmates of such institutions and their salaries are fixed under the provisions of Section 9280, R. S. Mo. 1939. This section further provides that the Board of Managers in charge of the office at Jefferson City shall have a chief clerk, who shall receive a salary of not to exceed \$2800 per annum.

The Eleemosynary Institutions of the State, located at Fulton, St. Joseph, Nevada and Farmington, the State Sanatorium at Mount Vernon, and the Missouri State School at Marshall, constitute the various institutions under the control and management of the Board of Managers and necessarily employ hundreds of employees to work in said institutions and care for the inmates.

You ask whether the board has power to create an executive secretary and set the salary of such secretary. We are of the opinion that under the broad powers given the Board of Managers to employ the necessary assistance to properly care for and manage the various institutions that it has the power to employ the necessary and essential help in the central office at Jefferson City and to fix the amount of salary of the employees located therein, within reasonable and lawful limits. Under the statutes the board would have no authority to create any new office or appoint an officer for such office. However,

the Board of Managers has the authority to designate a certain employee to perform certain duties. The name given the employee is not significant and if the board desires to employ such a person and, for purposes of designation, desires to call him "Executive Secretary," we see no objection to such appellation.

CONCLUSION

It is our opinion that the Board of Managers of the State Eleemosynary Institutions has the authority to employ a clerk in the office at Jefferson City, Missouri, to perform the necessary duties in connection with the administrative duties of the board, and may call the clerk so designated as "Executive Secretary," if it so desires, however, the salary must be in keeping with the duties performed.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

CRH:CP

APPROVED:

ROY MCKITTRICK
Attorney-General

LOTTERIES: A plan whereby persons in attendance at a movie
THEATRE: having a chance to be selected to answer some
question which may be propounded to them, and,
if they answer the question correctly, they are
awarded a prize and, if incorrectly, they are
given passes to the theatre, is a lottery.

February 4, 1943

Mr. Kelso Journey
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

This is in reply to your letter of January 25th, 1943, wherein you request an opinion from this department on the following statement of facts:

"Upon Tuesday the patrons desiring to enter the theatre paid a regular admission price at the ticket window. The regular picture was run as advertised. As part of the program within the theatre the manager went upon the stage and announced to the audience that he would ask questions to the audience; that an employee would pass down the aisles and among the audience and would act as a selector; that the members of the audience who desire to participate would signify their intentions by raising their hands, and that the selector would select or choose one of such persons. The selector then would select such a person and announce the fact to the manager. The manager then announced that the question he intended to read to that person was worth two quarters (50¢), or some monetary amount, if answered correctly. Then he proceeded to read a question relating to some subject generally known. A typical question was, 'Who wrote the song hit, "I'm Dreaming of a White Christmas"?' If the person so selected answered

the question correctly, the selector gave that person the sum of money first mentioned. Should the person selected fail to answer within a reasonable time or if that person answered the question incorrectly, then the manager would call to the entire audience for the answer. In that event the selector gave the person so selected one and sometimes two passes to the theatre, which entitled that person to enter the theatre for amusement a later date free of charge.

"Each week a sum of \$10.00 from the funds of the enterprise is allotted for prizes for answering such questions. If some questions are unanswered, the money allotted for those questions is held over for the following week and the prizes increase accordingly.

"Do the above facts constitute a lottery under the laws of this state in your opinion?"

Section 10 of Article XIV of the Constitution of Missouri, which relates to lotteries, reads as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprizes for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprize tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4704, R. S. Mo. 1939, which is an enabling act to the above Constitutional provision, provides as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The leading and most recent case on lotteries in this state is State ex inf. McKittrick v. Globe-Democrat Pub. Co., 110 S. W. (2d) 705. In this case the court, at l. c. 713, in speaking of the subject of lottery said:

"It will be noted both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been several times held that within their meaning and intent a lottery includes every scheme or device whereby anything

of value is for a consideration allotted by chance. State v. Emerson, 318 Mo. 633, 639, 1 S. W. 2d 109, 111. The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. * * * * *

And, on the elements of lottery, at l. c. 713, the court further said:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance. * * * * *

From the statement of facts which you submit we find that there is no question but what two of these elements exist, namely, consideration and prize. The consideration for the admission to the movie, and the prize to the person who is selected to answer the question if the person answers the question correctly and, if he does not answer the question correctly, he still gets a prize, which is passes to the movie. This leaves a question of whether or not there is an element of chance involved.

Under the facts which you submit an employee passes down the aisles and among the audience and selects a person who will be interrogated. All persons in the audience who desire to be interrogated are asked to raise their hands and from those who raise their hands the employee selects the one who will be interrogated and announces the fact to the manager. Then the manager announces the question and states what it will be worth if the question is answered correctly. By these facts we think there can be no doubt but that the

person who is attending the movie has the chance of being selected as the one who will be interrogated. If he is not in the theatre, then, of course, he could not be selected. From your statement we understand that the persons entering the theatre paid a regular admission price, so we assume that there were no free tickets and for that reason, every person taking part in this plan had paid a consideration therefore.

We have researched considerably on this question, which is annotated in 113 ALR 1121; 103 ALR 867; 48 ALR 1106 and 57 ALR 424. The question of whether or not the element of chance exists in any particular plan will depend upon the facts. We quote from the cases in these annotations which we think are closest to the facts which you have submitted.

In 48 ALR, l. c. 1117 is stated the following:

"In State v. Shorts (1868) 32 N. J. L. 398, 90 Am. Dec. 668, a lottery was held to be shown where defendant, exhibiting a panorama, had previously circulated handbills to the effect that 800 presents of various values would be distributed among the audience, and in pursuance thereof gave each person upon entering a numbered ticket, and after the close of the exhibition persons holding numbers called out at random were given premiums according to defendant's selection, if he thought they would be good advertisers of his exhibition. The court said, in delivering the opinion: 'Taking a practical view of the thing, its real nature cannot be misunderstood. It is clearly a "lottery," if tested by any of the ordinary definitions of that term. A lottery, says Johnson, is a "game of chance; a distribution of prizes by chance." This ingredient of chance is, obviously, the evil principle against which all prohibitory laws are aimed. It is by this

means that cupidity is solicited, for, if fortune be propitious, in consideration of the trivial price of a ticket, a return of value is to be expected. This temptation was, undoubtedly, offered to the public by these defendants.' The court in conclusion says: 'My conclusion is that this was a game of chance, and consequently a lottery, and none the less so because of those reservations of control over it, by the adroit use of which the getters-up of the game were sure, in all substantial respects, to be the winners. It is an affair conspicuously within the mischief at which the statute is leveled; the particular traits of it, above noticed, appear like devices to evade the law. But the law regards not mere semblance, but substance of things, and consequently these devices, however ingenious, cannot be successful.'

"In *Negley v. Devlin* (1872) 12 Abb. Pr. N. S. (N. Y.) 210, where tickets were sold to a grand concert for the benefit of charity, each ticket entitling the bearer to admission to the concert, and to whatever gift might be awarded to its number, the scheme was held to be a lottery."

A Missouri case is annotated in 57 ALR 424, as follows:

"The statute against aiding the establishment of a lottery as a business or avocation was held in *State v. Emerson* (1927) Mo. ___, 1 S. W. (2d) 109, to have been violated by the president of a corporation engaged in the future business, where the method of business was to sell contracts for \$55 each, to be paid on weekly instalments of \$1, the company reserving the right to discount one or more contracts

each week by charging off deferred payments and delivering to the contract holder \$55 worth of furniture without further payment. The court held in effect that the discounting of the contract each week at the pleasure of the company was a determination by 'chance' within the meaning of the statute, and rejected the contention that the element of 'chance' was not present because there was absent from the determination of the winners the casting of lots, and drawing of cards from a box or wheel, or other method usually employed in such transactions."

We think these authorities support our conclusion.

CONCLUSION

From the foregoing it is the opinion of this department that a plan whereby persons in attendance at a movie theatre are given a chance to be selected as the one to answer questions which may be propounded by the manager, and where, if they answer the question correctly, they are awarded a prize, or, if incorrectly, they are given passes to the theatre, is a lottery and in violation of the Constitution and laws of this state.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
ATTORNEY-GENERAL

TWB:CP

INSANE PERSONS: Under the facts in this case patient in question belongs to the State of Missouri and not the State of Illinois.

February 5, 1943

Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of January 25th, wherein you request an opinion from this department, as follows:

"On January 2, 1931, James W. Perrin was admitted to State Hospital #2 as a county patient from Macon County, having been committed by his brother, C. P. Perrin of Calleo, Missouri. The patient was born and raised in Missouri. He was diagnosed as an epileptic with deterioration. He was hospitalized continuously until June 6, 1942, when he was discharged from State Hospital #2 to the care of his son, Mr. Floyd Perrin, 218 Grand, East Alton, Illinois.

"We now have a letter from the State Deportation Agent of Illinois saying that James W. Perrin has been hospitalized in the Alton State Hospital, and he wishes authorization for his return to State Hospital #2.

"As this patient has been discharged from State Hospital #2, and it is a question as to whether he could have established a residence in Illinois, we are asking your opinion about taking him back to State Hospital #2."

From your statement we understand that the patient was legally admitted to State Hospital #2 on January 2, 1931, from Macon County, Missouri, as a county patient, and was discharged from State Hospital #2 to the care of his son in East Alton, Illinois. The gist of your question is whether the patient, now in the State Hospital of Illinois at Alton, Illinois, belongs to that state or should he be returned to Missouri for hospitalization in one of our state institutions.

We have had the benefit of various letters from your files relative to this patient and the history of the case. We assume that the patient was legally committed to State Hospital #2 at St. Joseph, Missouri, by Macon County on January 2, 1931, as a county patient. Your letter states that the patient was born and reared in Missouri and that his case was diagnosed as an epileptic with deterioration. We note the language of your letter wherein it states that the patient was "discharged from State Hospital #2 to the care of his son, Mr. Floyd Perrin, 218 Grand, East Alton, Illinois." It is significant that he had been in State Hospital #2 at St. Joseph, Missouri, for ten and one-half years before his discharge. The record does not show how long the patient has been in the Illinois institution. However, under the facts as gathered from the letter, he has not been a patient there for more than six or seven months, at the most.

Section 9321, R. S. Mo. 1939, provides in part as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. * * * * *

(Underscoring ours.)

We will take the word "discharged" as used in your letter as meaning that the patient was released or set free from the institution, and, if such was the case, it was unnecessary to

state that he was discharged to the care of some other person. The word "parole" as used in the statute means, as we understand it, a conditional and revocable release, upon his own recognizance or subject to supervision provided by statute. If the patient was discharged as completely cured he could establish his residence wherever he saw fit. But, since in your letter you state that he was discharged to the care of someone else, we would understand that the patient had not entirely recovered from his affliction and could not establish his residence somewhere else of his own volition.

In the case of State ex rel. Taylor v. Wurdeman, 129 Mo. App. 263, 1. c. 273, the court, in quoting from an old English case, said:

"* * * In disposing of the petition, LORD ELDEN said the old and settled law was not to grant a commission of lunacy to be executed at any other place than the residence of the supposed lunatic; citing Ex parte Hall, 7 Ves. 261; that if a resident of London were conveyed into Essex, he still would be a resident of the city, and no man could be said to reside in a place where he had been carried while he had not mind enough to make a change of residence. * * * * *"

Section 9356, R. S. Mo. 1939, provides as follows:

"No person shall be entitled to the benefit of the provisions of this article as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in sections 9348 to 9352, inclusive, of this article. Every patient in a state hospital

shall be deemed to be the county patient of the county first sending him till one year after his regular discharge from the hospital."

It will be observed from this section that where a patient has been regularly committed to a state hospital and has been regularly discharged therefrom, that he shall be deemed a county patient of the county first sending him until one year after his regular discharge from the hospital. So, upon the facts as we have them, the patient, under our own statute, is a county patient of Macon County. No doubt Illinois has a statute, which most states have, which provides that a person under these circumstances cannot become a charge of that state until he has been a resident for at least a year.

CONCLUSION

It is, therefore, our opinion, based upon the facts in your letter, and the statement of facts in the letters accompanying your request, that the patient in question is a Missouri patient and not an Illinois patient.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP

SCHOOLS: Persons under twenty years of age should be enumerated even though absent in the military or naval service of their country.

April 7, 1943



Mr. Harold S. Jones
Superintendent of Schools
Pemiscot County
Caruthersville, Missouri

Dear Sir:

We have your letter of April 2nd, in which you submit the following for our opinion:

"I need an opinion in the matter of School Enumeration. We take it from the 1st to 15th of May and include those from 6 years of age to 20. Should we take the names of those under 20 that are in the Service? I will appreciate your opinion of this point so that I can inform our schools."

Section 10345, R. S. Missouri, 1939, provides for the taking of enumeration lists, and reads in part as follows:

"The board of directors of each district shall, between the thirtieth day of April and the fifteenth day of May of each year take, or cause to be taken, and forwarded to the County Superintendent of Schools an enumeration of the names of all persons over six and under twenty years of age resident within the district, desig-

April 7, 1943

nating male and female, white and colored, and age of each, together with the full name of the parent or guardian of each child enumerated;
* * * "

It will be seen that by the foregoing provision all children from six to twenty years of age who are resident within the district must be enumerated. We take it from your letter that the persons now in military service were residents of their respective districts at the time they entered the military service. The question, therefore, is whether or not a person loses his residence by reason of being absent in the military service of his country.

It has long been held in this state that residence is largely a matter of intention, and that such intention is to be deduced from the acts and utterances of the person whose residence is in issue. (In Re Lankford Estate, 272 Mo. 1.) A person can change his residence if he wants to, but entering the military or naval service of the country during a war would not indicate that the person was intending to change his residence. A person's residence is the place to which he intends to return when absent, and it is quite likely that all of the persons under twenty years of age who enter the armed forces of the country during war time intend to return home when the war is over. There is nothing in the enlistment of a person in the service of his country or being inducted into such service during a war which would indicate that such person was intentionally changing his residence.

Section 7 of Article VIII of the Constitution of Missouri reads as follows:

"For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service either civil, or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the State,

April 7, 1943

or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison."

While the foregoing provision of the Constitution only deals with the effect which entering the military service has upon one's residence for voting purposes, yet we think it shows the policy of our law with respect to the effect which serving in the military forces of the government has upon residence. There is no reason to say that a person would not lose his residence so far as voting is concerned by serving in the military or naval forces, but that he would lose his residence so far as his right to free instruction in public schools is concerned. We do not believe that the status of a person as a citizen is affected in any way by his entering the armed forces of his country during the time of war.

CONCLUSION

It is, therefore, the opinion of this department that all persons from six to twenty years of age who are resident within a school district should be included in the enumeration lists, regardless of the fact that they may be temporarily away from said district in the military or naval service of their country.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

ELEEMOSYNARY INSTITUTIONS: Boiler inspection insurance may
STATE PURCHASING AGENT: be purchased by the State Purchasing
Agent for Eleemosynary Institutions.

April 17, 1943

4/19



Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter of recent date in which you request an opinion on the questions propounded therein. Your letter is as follows:

"For the past several years the Eleemosynary Institutions have carried what is called boiler inspection service. With this boiler inspection service there has been an insurance feature. There is no wording in the appropriation bill that allows us to buy insurance. However, we cannot purchase boiler inspection service without the insurance feature. This policy expires April 15, 1943.

"We have asked the Purchasing Agent to purchase boiler inspection service for us, and he informs us that it cannot be purchased without the insurance feature; he also advises us that he has an opinion from you that he cannot purchase insurance, unless it is specifically set out in the appropriation. The Purchasing Agent advises that we buy this insurance without consulting his office. In view of Section 14598 R. S. Mo. 1939, we doubt if this is possible, as it seems to us that this is a contractual service. We would like an opinion from your office on three things:

"1. Can we purchase this boiler inspection service, taking the insurance feature because it cannot be purchased without?

"2. If the word 'insurance' appears in the new appropriation bill will it be possible for us to purchase it?

"3. In either event, is it to be purchased by the Purchasing Agent or by the Board of Managers?"

I

Referring to the first question as set forth in your letter above, this department has heretofore rendered an opinion to Hon. W. Ed Jameson, President, Board of Managers, State Eleemosynary Institutions, under date of July 31, 1936, in which we informed him that it was the opinion of this department that the inspection of the boilers of the Eleemosynary Institutions of this State is a reasonable and necessary expense to the proper care and upkeep of said institutions, and that said expenses may be paid from the Operation fund of the several institutions. However, you state that it is necessary for you to buy insurance in order to obtain boiler inspection service. We do not think you would be authorized to purchase insurance of that character for the purpose of obtaining boiler inspection service, for the reason that the boiler inspection service is incidental to the insurance feature. If you can purchase the boiler inspection service without being compelled to buy insurance we are of the opinion that you may do so, otherwise our answer would be in the negative to this question.

II

Referring to your second question, as set forth in your letter above, it is not clear to us whether the word "it" in this question refers to insurance, or whether it refers to boiler inspection service. It is our opinion that if the appropriation act authorizes you to purchase insurance, and a boiler inspection service is incidental to the insurance contract, that you would be authorized to obtain boiler inspection service in such manner. Insurance companies which sell

this class of insurance are directly interested in the safety of the boilers so insured and necessarily inspect them at stated periods to lessen the risk. And, if the appropriation act reads "insurance and boiler inspection service" this would clarify the situation.

It is our opinion, however, that if money is appropriated by the Legislature to the Eleemosynary Institutions for the purpose of purchasing insurance, and boiler inspection service is incidental to the insurance contract, such insurance may be purchased for the institutions by the State Purchasing Agent.

III

To your third question, as set forth in your letter above, we refer you for an answer to Section 14598 R. S. Mo. 1939, which provides as follows:

"Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this chapter or the rules and regulations made thereunder, such order or contract shall be void and of no effect. The head of such department or agency shall be personally liable for the costs of such order or contract, and, if already paid for out of state funds, the amount thereof may be recovered in the name of the state in an appropriate action instituted therefor."

It is our opinion that the purchase of insurance by the various Eleemosynary Institutions of this State comes within the terms in this statute of "contractual services" and, therefore, it is necessary that if and when it is required that insurance be purchased, and money is appropriated for that purpose, that same be done by the State Purchasing Agent.

Respectfully submitted,

APPROVED:

ROY MCKITTRICK
Attorney-General

COVELL R. HEWITT
Assistant Attorney-General

CRH:CP

STATE ELEEMOSYNARY INSTITUTIONS:
GUARDIAN AND CURATOR:

Superintendent of State
Hospital not authorized
to receive money and funds
due inmate.

April 22, 1943

FILED

46

Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date, in which you sent us a copy of a letter from Dr. Ralph Hanks, Superintendent of State Hospital No. 3, Nevada, Missouri, and also copy of a letter from Mr. William A. Sherwin, of Los Angeles, California, in which you request the opinion of this office on the question asked in Mr. Sherwin's letter.

From the correspondence we understand that there is, apparently, an estate in the State of California, a portion of which is due a patient in the State Hospital at Nevada, Missouri, and that you desire to know whether the Superintendent of this State Hospital may receive and receipt for money due the patient in this hospital.

Although the facts given us are very meager, we will give you our opinion, which may be a guide for you in this case.

We must assume that since the patient is an inmate of State Hospital No. 3 at Nevada, Missouri, that he is, and was at the time of his commitment, a resident of some County in the State of Missouri. If such is the case, and the estate is of sufficient volume, it will be necessary for a guardian and curator to be appointed by the Probate Court of the County of the patient's residence in Missouri and, after the guardian and curator has been duly appointed and has given bond, according to the laws of this State, he would be authorized and empowered to give a valid receipt to the person from whence the property came.

From the above we conclude that the Superintendent of State Hospital No. 3 at Nevada, Missouri, is not authorized to receive and receipt for the money and property of such ward and that it is the duty of a duly appointed guardian and curator to receive and receipt for such money or property.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

CRH:CP

APPROVED:

ROY MCKITTRICK
Attorney-General

COUNTY CLERK: Shall make the back tax book.

July 3, 1943



Mr. John R. Johnson
Assistant Prosecuting Attorney
Ellington, Missouri

Dear Mr. Johnson:

This will acknowledge receipt of your letter of recent date in which you request an opinion based on the following:

"I am having some trouble trying to convince Bob Parks the Collector and Lloyd Hill, the County Clerk which should make up the Back tax book, etc.

"It seems for the last few years that the Collector has been making his own back tax book, now Section 11120 would lead you to believe that such duty still remains with the County Clerk, but the Clerk maintains that Section 11124 put this duty over on the Collector, but I failed to construe it that way, however it does not matter to me who makes up the back tax book, and if your office will be so kind as to render an opinion on that matter it will be appreciated."

Before proceeding our examination of the statutes cited in your letter we call your attention to two additional statutes, namely, Section 11110 and 11114 R. S. Mo., 1939, which, in our opinion, should be read in connection with Sections 11120 and 11124 R. S. Mo., 1939. Looking now to the first section cited, Section 11120 R. S. Mo., 1939, we find the following:

"Within thirty days after the settlement of the collector, in the odd numbered years, the several county clerks in each county in this state, and in such cities, the register, city clerk or other proper officer, shall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of land and town lots on which back taxes shall be due in such county or city, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited, and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax at the time of making said back tax book, together with the clerk's fees then due), in appropriate columns arranged therefor, and the aggregate amount of taxes, interest and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited; said back tax book, when completed, shall be delivered by said clerk or other proper officer to the proper collector of the county or such city, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the state auditor, and the clerk or other proper officer shall charge such collector with the aggregate amount of taxes, interest and clerk's fees contained in said 'back tax book.' In all such cities the said 'back tax book' shall be made out, in alphabetical order, in the name of the owner, if

known; and if the owner be not known, then in the name of the person to whom such tract or lot was last assessed. All taxes, interest and clerk's fees hereafter contained in the 'back tax book' herein described shall bear interest from the time of the making out of said 'back tax book' at the rate of ten per cent per annum until paid. In computing interest under this article, a fraction of a month shall be counted as a whole month."

This section requires the county clerk in the odd numbered years to make a book called the "back tax book" within thirty (30) days after the collector's settlement. When this book is completed it is to be delivered to the collector, one copy being forwarded to the State Auditor. This is a mandatory duty imposed on the clerk of the county court. The statute is clear, it is unambiguous and needs no interpretation.

Turning now to Section 11124 R. S. Mo., 1939, we find the full text is as follows:

"Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county col-

lector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 11110 and 11114, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially: Provided, however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this law provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually. It shall be the duty of the county clerk and county collector to compare the collector's record of such list of delinquent lands and lots as corrected with the corrected 'delinquent land list' made pursuant to sections 11110 and 11114, and the county clerk shall certify in the 'delinquent land list' on file in his office that same has been properly recorded in the collector's office and shall attach a certificate at the end of the record of such list of delinquent lands and lots in the collector's office that such record contains a true copy of the 'delinquent land list' on file in his office. And where the words 'back tax book' are now used in

July 3, 1943

laws pertaining to the collection of taxes on delinquent lands, real estate and/or lots, the record of the list of delinquent lands and lots in the collector's office under the provisions of this law shall be held to be (where applicable and except as to city or town 'back tax book') such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided, shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots. Said collector shall be charged with the taxes, penalty and interest shown on such record of the list of delinquent lands and lots."

This section requires that annually the county collector make out a record which includes the remaining delinquent taxes, that he certify this record, sign same and this record is to be used as a basis for a comparison record of the "back tax book." It is the further duty of the county clerk and the collector to compare these two lists with the corrected delinquent land list made pursuant to Sections 11110 and 11114. We do not quote these two latter sections because of their great length and further because they have no useful purpose other than to supplement the statutes about which you inquire.

CONCLUSION

From our examination of the statutes you cite, together with others brought to your attention, we are of

Mr. John R. Johnson

-6-

July 3, 1943

the opinion that the "back tax book" shall be made by the county clerk.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:FS

COUNTY HIGHWAY ENGINEER: In counties of no less than 20,000 inhabitants or more than 50,000 inhabitants the county court cannot appoint the highway engineer by reason of Sec. 8660.

July 10, 1943

7/17
FILED
46

Honorable Kelso Journey
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Journey:

Herewith is enclosed the prior opinion of this office, rendered to the Honorable G. Logan Marr, on April 4, 1943, which you requested.

In your letter of July 8, 1943, you ask:

"Under Section 8660, Mo. R. S. 1939, does the County Court of a county containing not less than twenty thousand inhabitants or more than fifty thousand inhabitants have the power to appoint a county highway engineer assuming a vacancy exists and that the county has adopted the county highway engineer law?"

Section 8660, Mo. R. S. 1939, provides as follows, in its pertinent parts:

"Sec. 8660. County court may appoint county surveyor as county engineer--- compensation---assistants.---

The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor* * * Provided further, after

July 10, 1943

January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court. (R. S. 1929, Sec. 8011. Reenacted, Laws 1939, p. 674.)"

It would seem that the above quoted portion of the statute plainly indicates that in counties of not less than twenty thousand inhabitants or more than fifty thousand inhabitants, the county surveyor is the "ex officio county highway engineer." In other words, the person who holds the office of county surveyor is also the county highway engineer by reason of Section 8660.

The office of county surveyor is filled by election of an individual to that office, by reason of Section 13190, Mo. R. S. 1939. Therefore, the County Court cannot appoint a county surveyor, and the county surveyor being the ex officio highway engineer, the County Court cannot appoint a county highway engineer.

CONCLUSION

It is the opinion of this department that the County Court, of counties of not less than twenty thousand inhabitants or more than fifty thousand inhabitants, does not have the authority to appoint a county highway en-

Hon. Kelso Journey

(3)

July 10, 1943

gineer under Section 8660, Mo. R. S. 1939.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WCB:meh

LOTTERY:

Scheme whereby right to call a relative in armed service is awarded to theater patron is a lottery.

July 21, 1943

7/27
FILED
46

Mr. Kelso Journey,
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of July 17, 1943, as follows:

"Will you please give me your opinion upon the following question:

"Volunteers submit the names of members of the armed forces from Henry County to a local theater, which names are placed together in a box. Upon one particular night, in addition to the running of a regular picture, the following takes place in the theater: A small boy or girl draws a name out of the box. If the father, mother, sister, brother or husband or wife of the person whose name is drawn is present in the theater, they can make a long-distance telephone call to the person named, if the latter is in the United States. If connections by telephone can be made, the person present in the theater will talk from the stage of the theater. If, however, the member of the armed forces is outside the United States the qualified person in the theater may send a cablegram. The expense of the communication is borne by the theater. An admission is charged for any person entering the theater. Do these facts in your opinion constitute a lottery under the laws of this State?"

Mr. Kelso Journey

-2-

July 21, 1943.

In State v. McEwan, Mo. Sup., 120 S. W. (2d) 1098, 1099, it is said that in order for such a scheme as that outlined in your letter to constitute a lottery under Section 4704, R. S. Missouri, 1929, the elements of "prize, chance and consideration" must be present.

"Prize" is present here, in that the person selected is awarded the privilege of making a telephone call or of sending a cablegram at the expense of the theater.

"Chance" is present, in that the determination of who is to be awarded said privilege rests upon whether the name of his or her relative is drawn from a box which contains a large number of names.

"Consideration" is also present, since the right to participate is limited to those "present in the theater" for which they pay an admission charge. Such admission charge is held, in the McEwan case, to be in part for the right to participate in the drawing for a prize. The court stated (l. c. 1100): "It is idle to say that the payment made for seeing the picture is not, in part at least, a charge for the drawing and the chance given."

CONCLUSION

It is therefore our opinion that the facts outlined in your letter present a "scheme or drawing in the nature of a lottery" and is prohibited under Section 4704, R. S. Missouri, 1939.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:jn

WAGES, (STATE EMPLOYEES) - Writ of sequestration, under
H. B. 167, should be served on
State Treasurer.

July 29, 1943



Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

Your opinion request of July 26, 1943, has been referred to the writer for answer. Therein you ask:

"We notice that at this last Legislature a bill was passed permitting the garnishment of wages of State employees.

"Who is the person representing the State to be garnisheed, if a case is brought under this law? In our opinion it is possibly the State Treasurer. We want to be sure before some cases come up."

In answer to your inquiry it might be well to point out that House Bill No. 167 provides for the issuance of a writ of sequestration, as distinguished from garnishment proceedings.

Your specific question is, upon which state officer will this writ of sequestration be served?

From discussion with the author of this bill, and by a reading of House Bill No. 167, it is indicated that said House Bill was intended to be broad enough to allow the writ to be served upon anyone "charged with the duty of payment or audit of such salary, etc." There are two points which need to be discussed under that clause. First, the only officer of the State of Missouri authorized to pay state moneys out in settlement of wages, salaries,

July 29, 1943

and so on, is the State Treasurer. Secondly, the service of the writ of sequestration upon the auditing officer of the State would be a mere nullity for that officer, the State Auditor, has no authority to disburse state moneys, but can only issue warrants against which the Treasurer can then issue a check or draft, or pay same in cash. The service of the writ on the State Auditor would be an empty act, because the State Auditor does not have any moneys belonging to the State that can be disbursed by his office. Also, the service of the writ on the head of a department, for example the Attorney-General, to sequester the wages of an employee would be useless, because said employees are paid by warrant and that warrant must (legally) then be honored by the State treasurer either by cash, draft or check. Therefore, the service of the writ of sequestration on the head of a department of the State would be a nullity because said department head has no money which he can disburse.

The Missouri Constitution, Article X, Section 15, provides as follows:

"Section 15. Deposit of State funds by treasurer--how disbursed.--All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney General for the safekeeping and payment of such deposit, when demanded by the State Treasurer on his check--such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

Mr. Ira A. Jones

- 3 -

July 29, 1943

The above quotation plainly shows that only the State Treasurer can disburse state moneys.

The method of obtaining moneys belonging to the State is provided for by the Constitutional provision quoted above, and this method is not to be infringed or evaded by a statutory enactment. To argue that the writ of sequestration does not attempt to reach state moneys is to argue that it has no effect at all, for what result or what value could be had by service of the writ on any state officer other than the State Treasurer, who alone has the authority to disburse State moneys.

CONCLUSION

It is the opinion of this office that the State Treasurer is the proper State officer upon whom the writ of sequestration, which is authorized under H. B. 167, should be served.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

WCB:mcb

ELEEMOSYNARY INSTITUTIONS) State Sanatorium has no authority to
BOARD OF MANAGERS OF STATE) assign warrants and open accounts for
HOSPITAL #1) collection.

December 29, 1943

1/3/44
FILED
46

Honorable Ira A. Jones
President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of December 15, 1943, wherein you make the following inquiry:

"We have a letter from A. H. Bennett & Company, Investment Securities, Kansas City. They are attempting to float a bond issue in Butler County to pay Butler County's accounts.

"Butler County owes State Hospital #1, Fulton \$2,442.80, and the State Sanatorium, Mount Vernon, \$908.72. Is it possible for either the hospitals or the Board of Managers to assign these open accounts and any warrants the two hospitals may have against Butler County, to A. H. Bennett & Company for collection? Undoubtedly they will want a fee for collection.

"If memory serves me right, you have already ruled on this matter, but we do not seem to be able to find it in our files.

"Also, at State Hospital #1 Butler County should have paid this out of Class 1 warrants, and of course the County Court was in error in not paying Class 1 warrants, though probably paying Class 2 warrants, which are salaries.

"Should we bring action against Butler County before Bennett & Company floats the bond issue?"

We presume that Butler County is proceeding under Article 4, Chapter 16, R. S. Mo. 1939. In this event the unpaid warrants

December 29, 1943

and open accounts mentioned in your letter have been considered and would be paid out of the proceeds of the sale of the bonds.

There is no statutory authority permitting the Board of Managers to assign warrants or open accounts for collection. Reference may be made to Section 9306, R. S. Mo. 1939 in connection with rights of the Board of Managers to enforce collection of all debts and demands.

With respect to payment by Butler County to State Hospital #1 in class 2 warrants, the following sections of the statutes should be observed:

Laws of Missouri, 1941, Section 10911, page 650:

"The court shall classify proposed expenditures in the following order:

"Class 1. The County court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

Laws of Missouri, 1941, Section 10914, page 652:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 1. Care of paupers declared by lawful authority to be insane (in state hospitals)."

CONCLUSION

We are of the opinion that warrants and open accounts above referred to, cannot be assigned for collection. Further, that Butler County should pay State Hospital #1 out of class 1 warrants.

Respectfully submitted,

RCL:ir

R. C. Lashly
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TOWNSHIP SCHOOL FUND: No authority to invest in United States Bonds.

April 22, 1943



Hon. O. A. Kamp
Prosecuting Attorney
Montgomery City, Missouri

Dear Mr. Kamp:

This will acknowledge receipt of your letter of April 19, 1943, in which you request an opinion as follows:

"I am writing you regarding the loan-
ing of Funds belonging to the County
School Funds and to the Capital of
Township School Funds, regulated by
Sections 10376 to 10387 R. S. Missouri
1939.

"We have some funds on hand and there
seems to be a scarcity of borrowers at
the present time. The County Court
asked me to write you for an opinion
from your office, as to whether or not
the County Court has any authority and
whether it would be permissible, under
the statutes, for them to invest some
of the funds in United States Govern-
ment Bonds, of the present Second War
Loan or any U. S. Government Bonds?

"I will thank you for your opinion on
this question at your earliest conven-
ience."

In answer to your question concerning the investment
of County School Funds regulated by Sections 10376 to 10387
R. S. Mo., 1939, we are herewith enclosing you copy of an
opinion written by W. J. Burke, Assistant Attorney General, to
Honorable David A. Dyer, Prosecuting Attorney, St. Charles,
Missouri. The opinion holds that a County Court cannot invest
School Funds in United States Securities.

April 22, 1943

In regard to your second question which concerns the investing of the Capital School fund, belonging to the Townships, in United States Bonds, your attention is called to Section 10384, Article 2, Chapter 72, R. S. Mo., 1939, as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts for which he is liable and property exempt from execution. In all cases of loan, the bond shall be the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

In the case of Saline County et al., v. Thorp et al., 337 Mo. page 1140, Division I of the Supreme Court, in discussing the provisions of the laws concerning the lending of School Funds, spoke as follows at l.c. 1145:

"(4) Sections 9243-56, Revised Statutes 1929, say what a county court can do with reference to the investment, collection and reinvestment of public school funds. These statutes require that county courts 'diligently collect, preserve and securely invest . . . on unincumbered real estate security, worth at all times at least double the sum loaned . . . the county school fund;' and that these funds 'shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools.' (Sec. 9243) It is also provided by this section that the county court 'may, in its discretion require personal security in addition thereto.' The county treasurer is required to collect all school money, give receipts therefor, and file duplicate receipts with the county clerk. The county clerk is authorized to satisfy a school fund mortgage 'when the amount of said receipts is in full of all interest and principal of said bond and mortgage.' (Sec. 9246) School fund loans are required 'to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond,' and also with additional personal security if deemed necessary. (Sec. 9251) The mortgage is required to recite the bond and contain a condition for sale by the sheriff upon 20 days' notice. (Sec. 9252) Even after a loan has been made, the county court is given power to require additional security on the bond 'when they in their judgment deem it necessary for the better preservation of the fund,' and to enforce payment of the principal if it is not given. (Sec. 9253) Provision for sale by the sheriff, on order of the court, is made by Section 9254, and authority for the county to purchase and manage mortgaged land is given by Section 9256.

April 22, 1943

"The purpose of requiring a bond and personal security is, of course, to make it possible to collect the debt even if the land, securing the loan, decreases in value. The county court has no authority to give any right of the county to collect either principal or interest due (Veal v. County Court, 15 Mo. 412), or to dispense with either the bond, with its personal obligation to repay the money, or the mortgage conveying clear land as security. (Lafayette County v. Hixon, 65 Mo. 581.) Neither does it have authority to release a surety from his liability upon the bond or to take in payment of the amount due or any part thereof, upon a school bond and mortgage, a note which does not conform to the statutory requirements. (Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626.)"

The County Court is a body having limited powers and jurisdiction. These powers are limited and defined by statute, Consolidated School District vs. Jackson, 84 S. W. (2d) 988.

No power is given to the County Court to invest the Capital School Fund of the Townships in any other manner than is prescribed in Section 10384 supra.

CONCLUSION

The County Court cannot invest the Capital School Fund of the Township in United States Bonds.

Respectfully submitted,

W. O. Jackson
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh
encl.

JUSTICES OF THE PEACE: The term of office for a justice of
TERM OF OFFICE: the peace in counties under township
TOWNSHIP ORGANIZATION: organization is two years.

January 12, 1943

Hon. H. A. Kelso
Prosecuting Attorney
Nevada, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

"Section 2525, R. S. Missouri provides that the term of office of a Justice of the Peace shall be for four years. Section 13945 provides that in counties under township organization the officers, including justices, shall be elected at the biennial election.

"It would seem to me that the latter section would prevail but I have been requested by one of the justices of the peace of this county to obtain an opinion on this subject from your office."

Section 2525, R. S. Mo. 1939, to which you refer in your letter, provides that justices of the peace shall be elected at the general election for a term of four years. This is a general section under Justices of the Peace.

Section 13945, R. S. Mo. 1939, to which you refer in your letter, is a special act pertaining to officers in counties under township organization. This act provides that certain township officers, including justices of the peace, shall be elected biennially.

Under Section 37, of Article VI of the Constitution, it is provided as follows:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

It will be noted that this section provides that the duration of the term of such justice shall be regulated by law.

Under Section 1 of Article IV of the Constitution the legislative power, subject to the limitations of the Constitution, is vested in the Senate and House of Representatives. Under this section the General Assembly would have authority to fix the terms of justices of the peace in various counties.

The classification of officers in counties under township organization is not an unreasonable classification and would not be in violation of any of the provisions of the Federal Constitution.

In *Collins v. Twellman*, 126 S. W. (2d) 231, the court announced and applied the rule that "Where one of two conflicting statutes must prevail the special statute, all else being equal, must take precedence over the general law." Applying that principle here, Section 13945, supra, which would be classed as a special statute applicable to officers in counties under township organization, would take precedence over Section 2525, supra, which is a general statute applicable to justices of the peace.

CONCLUSION

From the foregoing it is the opinion of this department that the term of office of justices of the peace in counties

Hon. H. A. Kelso

-3-

1-12-43

under township organization is two years.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

INSANE PERSONS;

County may recover for money expended for
insane indigent county patient in certain instances.

February 4, 1943.



Hon. John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Keith:

The Attorney-General wishes to acknowledge receipt of your letter of February 2, 1943, in which you request an opinion from this department. Your request, omitting caption and signature, is as follows:

"On July 26, 1926, one Ida Belle Sims, wife of Lewis Sims, was adjudged insane by the county court of Iron County, and sent to State Hospital No. 4 at Farmington, Missouri as a county patient.

"At the time they owned a farm in this county, their title being an estate by the entirety.

"She was kept at the hospital until September 4, 1926, and on that date was paroled. On July 12, 1928, she was again found to be insane by the court and ordered returned to the hospital where she has been continuously since that date.

"Lewis Sims died last December, but a short time before his death he was adjudged of unsound mind and incapable of managing his affairs, and a guardian was appointed for both of them, and an

order made by the probate court for the guardian to sell the land, which was done, the amount received for the sale by the guardian being \$3,000.00.

"The county has paid to date more than \$1400.00 for her care at the Hospital.

"Now, may the county legally collect from the guardian the amount expended for her care at the Hospital, as well as for the future expenses of her while at the Hospital?"

I assume from your statement that at the present time Mrs. Sims has a guardian and also has an amount in her estate received after the death of her husband.

In the case of Chariton County, Appellant vs. Hartman, 190 Mo. 71, it was held that where a person has been adjudged insane and indigent and therefore supported by the county at an eleemosynary institution, and the guardian and curator of such person, while she is so supported by the county, recovers for her and in her name certain property, the county cannot recover from her curator and guardian, nor from her estate, the amount of the property by him so recovered in payment to the county for money by it spent in her maintenance. At that time there was in effect a statute - Section 3697, R. S. Mo. 1899, which provided as follows:

In all cases of appropriations out of the county treasury for the support and maintenance or confinement of any insane person, the amount therefor may be recovered by the county from any person who by law is bound to provide for the support and maintenance of such person if there be any of sufficient ability to pay the same."

Under that statute the Chariton County case held that the section aforesaid had reference to the relation of parent and child or where some person is bound under the law to provide

Feb. 4, 1943.

for the support and maintenance of his father. In such case a recovery could be maintained against him. However, they held that the statute fell short of embracing within its provisions actions against the guardian of the ward personally or against him as a representative of the estate. This was predicated upon the decision of the court in *Montgomery County v. Gupton*, 139 Mo., l. c. 308, in which the court said the following:

"It is well settled at common law that the provision made by law for the support of the poor is a charitable provision from which no implication of a promise to repay arises, and moneys so expended cannot be recovered of the pauper in the absence of fraud without a special contract for repayment."

In the later case of *Andrain County v. Muir*, 249 S. W. 383, 297 Mo. 499, the court set out the principle arrived at in the *Chariton County* case and further held that in order to recover in a case of this kind, the county must bring itself within the statutory provisions and show that the defendant was "bound to provide" for the person's support and was able so to do. This case was decided in 1923. In 1927 the statute which is set out above was amended by adding a certain phrase at the end of such statute, which is as follows:

"and also the county may recover the amount of said appropriations from the estate of such insane person."

Therefore, it would appear that under Section 500, R. S. Mo. 1939, in a situation of the kind which you set out in your request, that the county may recover the amount of the appropriations made by it for the support and maintenance or confinement of any indigent insane person.

Therefore, it is the opinion of this Department that the county may legally collect from the guardian the amount

Hon. John H. Keith

-4-

Feb. 4, 1943.

expended for his ward's care at a Missouri eleemosynary institution. This, of course, answers the question as to whether or not future expenses can be collected, since if she remains at the hospital and she still has an estate out of which to pay her own expenses, that in such case the county would be authorized to collect such expenses from her estate.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

COUNTY HIGHWAY COMMISSION: The provisions of the County
DUTIES OF COUNTY COURT Highway Commission Act are manda-
IN REGARD THERETO: tory and it is the duty of the
County Court to comply therewith.

March 18, 1943

Hon. J. V. Kesterson
Presiding Judge
Pettis County Court
Sedalia, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you submit the following:

"A question has arisen before the Pettis County Court in regard to the state laws applying to the creation of a county highway commission. I refer particularly to Chapter 46, Article 2, Sections 8502-8513 of the Revised Statutes of Missouri, 1939.

"It is our understanding that this law, passed in 1927, is mandatory upon the County Court, though no such commission has ever been established in Pettis County. Our desire is of course to fulfill the law if it applies to this county, and we therefore are anxious to have your opinion."

The County Highway Commission Act, which is Article 2, of Chapter 46, R. S. Mo. 1939, was enacted in 1927 (Laws of Missouri, 1927, page 421). The first section of this Act, which is Section 8502, R. S. Mo. 1939, reads as follows:

"There is hereby created and established in the several counties of this state a county highway commission to be composed of four members, who shall serve without

compensation and who shall possess the qualifications, and be appointed in the manner and for the term in this article provided."

Your question is whether or not it is mandatory on the part of the County Court to appoint these Commissioners and comply with the provisions of the Act. Our Supreme Court in *State ex rel. Ellis v. Brown*, 33 S. W. (2d) 104, announced the rule in determining whether a statute is directory or mandatory. At 1. c. 107 the court quoted from 25 R. C. L. Par. 14, pp. 766, 767, the following principle:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

Also, in State ex rel. Hay, et al., Election Commissioners, v. Flynn, 147 S. W. (2d) 210, the St. Louis Court of Appeals, in construing an election statute and whether or not it was mandatory, made this statement, l. c. 211:

"* * * There is no absolute test by which the question here presented may be resolved, but in passing upon the matter, the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other. * * *"

If the County Highway Commission Act should be considered as directory, then the various County Courts of the State by not following its provisions could nullify the Act. Another statutory construction which might be applicable here is that the Legislature should not be held to have enacted a meaningless statute. After considering this entire Act we are convinced that the lawmakers have intended that it be mandatory and that its provisions be carried out by the various County Courts.

CONCLUSION

It is, therefore, the opinion of this department that it is the mandatory duty of the County Court to appoint the County Highway Commission and carry out the provisions of the County Highway Commission Act as is prescribed in said Article 2, Chapter 46, R. S. Mo. 1939.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

SCHOOLS: (1) Voter must vote for county superintendent of schools in the school district in which he resides;
(2) Voter must reside in school district thirty days prior to the election in which he offers to vote.

March 30, 1943.

4-21



Honorable E. V. Kell
Prosecuting Attorney
County of Howell
West Plains, Missouri

Dear Mr. Kell:

The Attorney-General wishes to acknowledge receipt of your letter of March 25th in which you request an opinion from this Department. Your letter requesting such opinion is as follows:

"Will you please favor me with an opinion on the following questions regarding the voting in election for County Superintendent of Schools:

"1. Can a voter cast his vote for County superintendent of Schools in a school district other than the district where he resides in same county?

"2. If a voter has changed his residence 30 days prior to said election, which district may he legally cast his vote for superintendent of Schools."

We note from your letter that there are two questions which you wish answered, and we will first consider question number one, as to whether or not a voter may cast his vote for county superintendent of schools in a school district other than the district where he resides in the same county.

We first call your attention to Section 10420, R. S. No. 1939, which sets out the qualifications of the voters at a district school election. Omitting that part of said section which is not pertinent to the question involved, we wish to cite the following:

"* * * A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

As will be seen from the above provision, in order for a voter to vote at an annual school election for the directors in his district it is necessary that he reside in the district wherein he wishes to vote, at least thirty days next preceding the annual or special meeting at which he offers to cast his ballot.

As is common knowledge, the county superintendent of schools is voted on at the annual school meetings in the different districts in the year in which such officer is required under the statutes to be elected. If a person voted in a district in which he did not live or in which he had not resided for thirty days preceding the election at which he offered to vote, he would be in the anomalous position of voting for a county superintendent of schools in a precinct in which he had not been qualified to vote for a school director. We do not feel that this is the meaning of the statutes, but that in order that a person vote for the county superintendent of schools that he must cast his ballot in the school district wherein he resides and wherein he is a qualified voter.

Your second question is as to where the voter shall cast his vote for superintendent of schools when he has changed

his residence thirty days prior to an election therefor.

As can be seen from the statute which has been cited above, when a voter has lived in a school district thirty days prior to any election at which he offers to vote, he becomes a qualified voter of that particular district and may vote for the directors for such school district, and under the reasoning and decision above he therefore must cast his ballot for the county superintendent of schools in the district into which he has moved and wherein he has resided for thirty days.

Conclusion.

Therefore, it is the opinion of this Department that a person wishing to vote for county superintendent of schools must cast his ballot in the district wherein he resides and has resided for thirty days previous to the day of election, and may not vote in any other school district.

It is further the opinion of this Department that where a voter has changed his residence thirty days prior to an election at which he offers to vote, that he must cast his ballot for county superintendent of schools in the district where he has moved and wherein he has resided for thirty days preceding the day of election.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

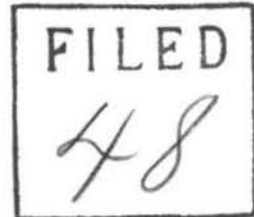
ROY MCKITTRICK
Attorney-General

JSP:EG

COUNTIES: Statute of limitations operates against the county.

April 1, 1943.

45



Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Keith:

The Attorney-General wishes to acknowledge receipt of your letter of March 31st in which you request an opinion of this Department. This request, omitting caption and signature, is as follows:

"In Re: INSANE PERSON: No. 48-43

"Your assistant, Mr. John S. Phillips wrote the above opinion on statement of facts contained in my request on 2-4-43, which was approved by you.

"I have filed a demand against the estate of Ida Belle Simms, the insane person concerning whom I wrote you for the above opinion, based on the amount paid out by Iron County since she became a patient in Hospital No. 4, July 12, 1928.

"The guardian has filed an answer wherein he pleads the Five Year statute of limitations as a bar.

"As I explained in my letter requesting your opinion above mentioned I made it clear I think that she recently became possessed of an estate which

April 1, 1943

is the proceeds of and from sale of land held by her and her deceased husband by the entirety, and prior to that time she had no estate whereby the county could obtain payment. I enclose copy of answer of guardian, and would appreciate your opinion as to whether or not the five year statute of limitations applies, as it will be helpful with the probate court. See Barry Co. v. Glass, 160 S. W. (2d) 808."

The question involved in this opinion request seems to be whether the five-year statute of limitations operates against a county.

My understanding of the facts is that the insane person in question was placed in the hospital in 1926 and later released, and in July, 1928, she was again found insane by the court and ordered returned to the hospital at Farmington where she has remained ever since. Subsequently, she came into the possession of certain property, and the county is now attempting to collect the amount expended for her keep for 1928 until the present time.

If the statute of limitations operates against a county, of course the county can only recover the amount expended five years previous to the filing of the claim. Otherwise, they would be permitted under the law to be reimbursed for the entire amount expended since 1928. The old common-law rule that limitations did not run against the sovereignty, has been revoked by the decisions in numerous jurisdictions, and in this State the courts have held that the limitations of actions operate against a county.

I first wish to cite you to the case of St. Charles County v. Powell, 22 Mo. 525, 66 Am. Dec. 637, in which the prerogative recognized at common law, that the lapse of time will not bar the right of the King, was renounced and the

April 1, 1943

court held that the statutes of limitation run against a county the same as an individual even though a county be considered as having the attribute of sovereignty.

Again, in the case of *Nall v. Conover*, 122 S. W. 1039, 223 Mo. 477, the court held that the limitations run against a county. And again, in the latest case which seems to pass on this subject, namely, *Emery et al. v. Holt County et al.*, 132 S. W. (2d) 970, 345 Mo. 223, the court held that the maxim, "nullum tempus occurrit regi," did not apply to the political subdivisions of the State and only applied to the State itself. See cases cited in this opinion. This decision written by Gantt, J., further stated that the maxim cited above was abolished at an early date in this State.

Following the decisions cited above and the rulings given by the court in such cases, we are of the opinion that the statute of limitations as set out in Section 1014, R. S. Mo. 1939, will run against Iron County in the collection of any money expended by it for the upkeep of the insane individual and that therefore the county can only recover the amount expended for a period of five years previous to the date of the filing of such claim in the probate court.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

SCHOOL DISTRICT: May close school and transport pupils of the district to other schools. Funds in hands of Treasurer known as Teachers' Fund may not be invested in Defense Bonds.

October 12, 1943

2
Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

10-22
FILED

48

Dear Sir:

This office is in receipt of your recent request for an opinion concerning certain school matters. Omitting caption and signature the text of this request is as follows:

"For four or five years a certain School District in this county, which would be known as a Common School District, has had no school conducted within the district, although there is a school house therein, but they have held annual meetings and have a board of directors composed of three persons.

"The pupils of the district have been transported to another district outside the county, and the expenses of transportation paid by the district. A levy for incidental funds has been made annually, and the expenses of transporting the pupils to the other school have been paid out of this incidental fund, but no levy is made for teachers fund, and now there is a surplus of several hundred dollars.

"May this district continue legally to operate in this way, that is, not have a school conducted in the district, and continue to maintain its organization and have the pupils transported as they have been doing, and may the board of directors invest the surplus funds in defense bonds?"

A closing of schools within the State of Missouri by boards of education is provided for by the Missouri Revised Statutes and it would seem from reading same that in three situations schools may be closed in the state.

In the first instance a school may be closed by a board of education and the question of transportation must be ratified by a two-thirds vote of the qualified voters of the district. Under this arrangement the teachers' fund of the district may be used to defray the tuition costs and the incidental fund to pay the transportation costs of the pupils in the closed school. This section, 10324, R. S. Mo. 1939, reads as follows:

"Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district or districts for school purposes, in the same manner as is now provided in section 10408: Provided, that no school district shall be deemed to have lapsed where the failure to make the needed provision for the eight months of school results from the irregular or void proceedings had for that purpose: Provided, that in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated, and, if desired, arrange for transporting children

to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

In the second instance in which a school may be closed we find that a state superintendent may cause a school to be closed where he finds that the average attendance in the school is less than fifteen. This is section 10464, R. S. Mo. 1939 and reads as follows:

"If any district in this state shall have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall, in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

The third situation in which a school may be closed is the one which calls for a conservation of school expenses and this is Section 10457, R. S. Mo. 1939, which reads as follows:

"Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more districts to a schoolhouse elsewhere,

and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils: Provided further, that in such temporary combinations the record of daily attendance of pupils from each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments."

Directing our attention to this question "Can the teachers' fund be invested in defense bonds?" Section 10366, R. S. Mo. 1939, provides: "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected. * * *"

Looking now to the decisions in the state, we find authority for this expression "School taxes can only be applied to the purposes for which levied." State ex rel. v. Thompson, 64 Mo. 26 and Rice v. McClellan, 58 Mo. 116.

"The power of the board is limited to that expressed in the statute, and the board is liable for misapplication of the teachers' fund." School district vs. Hawhan, 273 S. W. 182.

CONCLUSION

From the above statutes and decisions in this state, it is the opinion of this department that a school may be closed by a board of directors and the pupils of the school transported to other schools upon the payment of tuition and transportation costs; that the determination of the transportation of pupils is a matter to be decided upon either at the annual school meeting or at a public meeting called for that purpose.

We are further of the opinion that the treasurer of a school board may not invest funds in his hands, known as

"teachers' fund" in defense bonds because money raised by taxation for the payment of teachers' salaries can only be used for the purpose for which the tax was levied originally. It would seem that the high patriotic motive behind the thought of investing a surplus in this fund, however creditable it may be, is not the determining factor in such an instance.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:CP

BANKS:
TRUST COMPANIES:
BUILDING AND LOAN ASSOCIATIONS:
SMALL LOAN COMPANIES:
LOAN AND INVESTMENT COMPANIES:
REGISTERED PAWNBROKERS:

Resume' of money lenders'
activities under Missouri
Statutes.

March 9, 1943

Hon. Raymond J. Lahey
Representative of St. Louis
House of Representatives
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date, in which you request the opinion of this department on the questions asked therein. Your letter is as follows:

"The House Committee investigating money lending agencies has authorized me to write you concerning Section 4813, Revised Statutes of Missouri, 1939, and request of you an opinion as to this law concerning its application to the various money lending groups authorized by other state statutes to engage in specialized types of money lending, including banks, trust companies, building and loan associations, companies operating under loan and investment act, registered pawn brokers, and small loan lenders operating under the small loan law."

Your question is, what application does Section 4813, R. S. Mo. 1939, have to the various money lending corporations or agencies authorized by the statutes. We take it that you desire to know whether or not, in those instances where the statutes permit a rate of interest in excess of the provisions of Section 4813, supra, would it be a violation of the criminal statute for companies to loan money in excess of two per cent per month.

Section 4813, supra, was enacted by the General Assembly of Missouri in 1899 (Laws of 1899, page 167) and provides, R. S. Mo. 1939, as follows:

"Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

This section was held to be constitutional in the case of *Ex Parte Berger* (1905) 193 Mo. 16, and the court, at page 25, made this observation:

"Prior to the enactment of Section 2358 on the 14th of April, 1899, the taking of usurious interest had never been declared a criminal offense by the General Assembly of the State of Missouri, and it is now earnestly insisted by learned counsel for petitioner that this section is unconstitutional, because it is not within the power of the Legislature to make usury a crime and punish it as such."

And the court further said, in this opinion, l. c. 28:

"The taking of interest, then, beyond a legal rate is granted to no person in this State, and the act now before us simply makes the unlawful act of taking interest in excess of two per cent per month a misdemeanor. Laws against usury are founded on principles of public policy, principles that have for ages been recognized, and this act seeks only to punish that which has for many ages been considered unlawful in itself. The right to regulate interest by legislative enactment being one conceded to be within the power of the Legislature, that body can regulate or prohibit it altogether. And if previous legislation on this subject punishing the infractions of usury laws by forfeitures of the interest have proved ineffectual to check the evil, it was perfectly competent for the Legislature to adopt more drastic measures and make it criminal. * * * * *

Notwithstanding this law has been on the statute books since 1899, the only prosecution under this statute reaching the appellate courts is the case of State v. Haney, 130 Mo. App. 95 (1908) wherein a conviction was sustained and the statute upheld.

There is also a section, 4812 R. S. Mo. 1939, which makes it a misdemeanor to "sell, assign, transfer, or in any manner dispose of any bond, bill of exchange, note or contract whatsoever knowing the same to be usurious, without giving the purchaser or assignee thereof notice of its usurious character."

Your inquiry is, as we understand it, as to whether the enactment of the small loan law would supersede or permit those licensed under the small loan act to charge more than two per cent interest per month. The small loan law is nothing more than a special grant of authority by the Legislature which permits those who comply with the provisions of the Act to charge the rates of interest as prescribed therein, which are in excess of the two per cent per month set out in Section 4813, supra. An applicant under the small loan act who takes out a license, submits himself to examination by

the licensing official, and meets all the other requirements of the Act, is authorized to loan money at a rate not to exceed three per cent per month on any loan made of \$100 or less in principal amount, and two and one-half per cent per month on any loan made of more than \$100 and not more than \$300 in principal amount.

The small loan act takes those who are licensed under the act from under the provisions of the general usury statutes and the criminal provisions of Section 4813, supra, and they are not violating Section 4813, nor, or they liable to the civil penalties provided by other provisions of the law. There are certain civil penalties against one who loans money at a greater rate of interest than eight per cent per annum, but it is only a crime to loan money in excess of two per cent per month, except by those who, by special legislative grant, are permitted to do so under the state law.

You refer in your letter to banks, trust companies, building and loan associations, companies operating under the Loan and Investment Act, registered pawn brokers, and small loan lenders. It seems unnecessary for us to go into the laws governing the activities of each of the above mentioned agencies, but they would be guilty of a crime under Section 4813, supra, if they loaned money in excess of two per cent per month, unless they had been given special legislative authority to do so. Usury has been defined as the receiving and taking, or contracting to receive and take, either directly or indirectly, a greater sum for the use of money than the lawful interest.

It might be well for us to call your attention to Section 8215 R. S. Mo. 1939, under the building and loan law, which provides as follows:

"No premium, loan fee, fines or interest or interest on such premium, that may be charged by or accrue to the said corporation according to the provisions of this chapter, shall be deemed usurious, and the same may be collected as debts of like amount are now by law collected: Provided, that this section shall be no protection against any unreasonable and extortionate charge, loan fees, fine, premium, or interest made by such corp-

oration in its spirit usurious and oppressive, and such practices shall be open to investigation and correction by the courts of the state."

The courts of this state have held that "although the premiums and interest aggregate more than the legal rate of interest, yet under the provisions of this section they are not usurious if the premium is fixed in the manner authorized by law." Cover v. Mercantile Mut. Building & Loan Ass'n, 93 Mo. App. 302; Stanley v. Verity, 73 S. W. 727, 98 Mo. App. 632; Callison v. Trenton Building & Loan Ass'n, 72 S. W. 477, 98 Mo. App. 677.

It is a misdemeanor for a pawn broker to charge or receive more than two per cent per month for any loan made by him, according to Section 15394, R. S. Mo. 1939, which is as follows:

"It shall be unlawful for any pawnbroker to charge or receive more than two per cent per month for any loan made by him."

Upon conviction such pawn broker shall pay a fine of not less than \$50 nor more than \$100. Therefore, under the statute, a pawn broker may charge or receive not more than two per cent per month on a loan. However, if he charges or receives more than that he is guilty of a misdemeanor and may lose his security in addition thereto.

There are also statutes regulating the activities of pawn brokers, dependent on the class of city in which the pawn broker resides. These sections are 6485, 6609, 6986, 7196, 7483 and 7691.

The loan and investment companies are organized under the provisions of Article 8, Chapter 33, R. S. Mo. 1939, and, under Section 5421, these companies loan money to persons and may charge \$1.00 for each \$50.00 or fraction thereof loaned, for examination or investigation of the character and circumstances of the borrower, and, where a loan is made, secured by a chattel mortgage or lien upon an automobile, a sum not greater than \$20.00 on account of extra hazards involved in such loan may be made. These charges must be in good faith and not arbitrarily made for the purpose of increasing the

cost of the loan to the borrower. However, in the event the lender retains all or part of the hazard fee charge for its own use, the borrower has the option of delivering and conveying the automobile or motor vehicle securing such note, regardless of condition, in full satisfaction of the balance due thereon.

It seems to have been the intention of the Legislature to have granted such legislative authority to certain companies operating under this particular law to charge in excess of eight per cent per annum (the statutory maximum for the use of money) in excess of this amount, if the company complies with certain provisions of the statutes. This may be by way of interest, or it may be by way of investigating fees and other charges, and those who operate under this law, if they comply with the provisions of this particular law in all particulars, would not be guilty of violating Section 4813, R. S. Mo. 1939.

It might be well for us to call your attention to the fact that a company or individual may charge more for the use of money than the lawful rate of interest permitted by law, and not be guilty of a violation of the criminal law. However, he may be guilty of usury and may lose the excess interest charge or may lose the security pledged to secure the loan and other civil penalties.

If an individual or company charges more than two per cent interest per month for the use of money and does not operate under some act of the legislature giving him such authority he is guilty of violating Section 4813, supra.

CONCLUSION

It is, therefore, our opinion that those individuals or companies who loan money, such as banks, trust companies, building and loan associations, loan investment companies, registered pawn brokers, and small loan companies, who comply with the statutes regulating their particular type of business, are not guilty of violating the criminal law provided in Section 4813, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

ROY McKITTRICK
Attorney-General
CRH:CP

PROBATE JUDGE: Fees received by Probate Judges for issuing order to Recorder to waive three (3) day waiting period between application and issuance of Marriage license, is an accountable fee. Probate Judge shall at the end of each month make and file with County Clerk, a report (a) of all fees collected for the month, (b) fees earned but not collected for month, except (1) fees collected for solemnization of marriages; (2) hearing and determining inheritance tax matters.

November 16, 1943

Honorable M. V. Lane,
Judge of the Probate Court
Putnam County
Unionville, Missouri



Dear Mr. Lane:.

This office is in receipt of your letter, written to Honorable Forrest Smith, under date of November 10th, 1943. Omitting caption and signature, such letter reads as follows:

"Along these Northern tier of counties we Probate Judges will undoubtedly be called upon to issue an Instantner for a Marriage License.

"What I would like to know if this fee is an accountable or non accountable fee, I realize that the fee for solemnizing a marriage is non accountable, but this I was in doubt of.

"What do you think the fee should ___ for issueing the instantner.

"Please let me know about this at an early date."

To answer your inquiry we turn to the provisions of Senate Bill No. 4, which on and after November 22, 1943, will become operative as Section 13404A, R. S. Mo. 1939.

This portion of our statutes concerns itself with the compensation to be allowed Probate Judges in counties which have or may hereafter have a population of less than 19,000 inhabitants. This section provides for the disposition of such fees and salaries.

After providing for the monthly installment payment of an annual salary, to be paid by warrant drawn by the County Court. The minimum salaries range from \$750.00 in counties having 10,600 inhabitants or less, to \$2,400.00 in counties having a population of less than 19,000. That portion of the statute useful for our purposes reads as follows:

"It is further provided that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided, * * *"

For the order which would issue whereby the three day period between making of the application and issuance of a license "instantly" the Probate or Circuit Judge would be entitled to a fee for making such order. (See Sec. 13,404, R. S. Mo. 1939.

Looking now to the Statutes which govern the issuance of Marriage licenses, we find that the provisions of House Bill No. 20, as passed by the Sixty-second General Assembly, which, when it becomes operative on November 22, 1943, as new Sec. 3364, R. S. Mo. 1939, requires an application for a marriage license three (3) days before a Recorder shall be authorized to issue a license. The only exception to the above procedure being as follows:

"Provided, however, that said license may be issued on order of the Circuit or Probate Court or a judge thereof in vacation, of the county in which said license is applied for, without waiting

Nov. 16, 1943

three (3) days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable."

The language of the statute is clear, unambiguous and leaves no doubt as to the intent of the Legislature. We deem it unnecessary to do more than point out the obvious intent of the Legislature.

C O N C L U S I O N .

From what has gone before, we therefore conclude: That the Probate Judge, shall at the end of each month, make and file with the County Clerk, a report of all fees as follows:

- EXCEPT
1. Fees actually earned and collected by him.
 2. Fees actually earned and not collected,
 - A. Fees earned and collected for the solemnization of marriages
 - B. And the hearing and determination of inheritance tax.

That an order of the Court authorizing the Recorder of Deeds to issue a marriage license on the same date application is filed is not within the exceptions mentioned above. Because it is not within the exceptions the fee received for the issuing of such order must be accounted for by the Probate Judge, the same as other fees earned, received and reported by him.

Respectfully submitted

APPROVED:

L. I. MORRIS
Assistant Attorney General

ROY MCKITTRICK
Attorney General

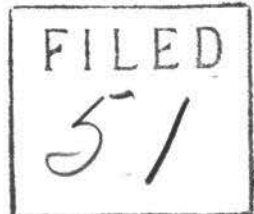
LIM:LeC

TOWNSHIP COLLECTORS:
TOWNSHIP BOARD:

Township board and not
county court is authorized
to fill vacancies in
office of township
collector.

December 7, 1943

12/9



Mr. Yewell Lawrence
Clerk of the County Court
Bloomfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of
December 3, 1943 presenting for our opinion the
following:

"I am writing you in regard to who has
the right to appoint a Township Clerk
in Township Organization counties when
one resigns or moves out of the Town-
ship before his term expires."

Section 13962, R. S. Mo. 1939 provides:

"Whenever any township shall fail to
elect the proper number of officers
to which such township may be entitled,
or when any person elected or appointed
shall fail to qualify, or when any
vacancy shall happen in any township
office from any cause, it shall be law-
ful for the township board to fill such
vacancy by appointment, and the person
so appointed shall hold the office and
discharge all the duties of the same
during such unexpired term, and until
his successor is elected or appointed
and qualified, and shall be subject to
the same penalties as if they had been
duly elected: Provided, that any
vacancy in the office of justice of the
peace or in the township board shall be
filled by appointment of the county court."
(Underscoring added).

Briefly this section provides that the township board is authorized to fill all vacancies that occur in township offices except vacancies in the office of justice of the peace and in the township board. Vacancies in the latter two offices are filled by the county court only.

The supreme court in the case of State ex. rel. Kent v. Olenhouse, 23 S. W. (2d) 83 ruled that a vacancy in the office of township trustee and ex officio treasurer was filled by the appointment of the county court and states, l. c. 85:

"* * * By the express terms of this section, it is clear that authority to fill a vacancy in the township board and in the office of justice of the peace is vested in the county court, while authority to fill vacancies in all other township offices is lodged with the township board."

And again in the above case, at l.c. 86, the court said:

"* * * By express terms of the statute, the township trustee is made a member of the board of directors; therefore, a vacancy in the office of township trustee creates a vacancy in the board of directors. * * *"

Section 13976, R. S. Mo., 1939, designates the township trustee and members of the township board a board of directors. Section 13945 provides for the election of "* * * two members of the board, * * *". The terms "township board" and "board of directors" are synonymous. State ex. rel. Kent v. Olenhouse, 23 S.W. (2d) l. c. 86.

As the township collector is not a member of the township board and performs none of the functions of that body, his office is not within the exception contained in Section 13962 which only authorizes the county court to fill vacancies occurring in the offices of justices of the peace and members of the township board. As a result a vacancy in the office of township collector is governed by the general provisions of the statute and is filled by an appointment made by the township board.

Mr. Yewell Lawrence

-3-

12-7-43

CONCLUSION

Therefore it is the opinion of this office that when a vacancy occurs in the office of township collector, the township board and not the county court has the authority to fill such vacancy by appointment.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

, APPROVED:

ROY MCKITTRICK
Attorney-General

VCT.sc

ESCHEATS: Real Estate in this state, belonging to non-resident decedent who died intestate leaving no heirs at law, will escheat to the state of Missouri. Personal property in this state, belonging to non-resident decedent who died intestate leaving no heirs at law, should be transferred to the administrator in the state of his domicile.

February 3, 1943

2
Hon. Joseph S. Levy
Attorney at Law
Argyle Building
Kansas City, Missouri



Dear Sir:

We acknowledge receipt of your letter of January 13th, last, requesting an opinion, which is as follows:

"The writer represents Carlton R. Benton, Public Administrator, of Jackson County, Missouri, as his attorney in the above entitled estate.

"The decedent had some property in Missouri which has been administered by the Missouri Court, and he also had property in Kansas which is being administered. To date I don't believe that the administrator in either estate has located any heirs of the decedent, but Kansas claims that they are the domiciliary estate and entitled to the proceeds due the Missouri estate after payment of claims and administrative expenses.

"I take the position that if any of the property is to escheat to the state of Kansas that they should first determine whether or not the property being administered in the state of Missouri should escheat to the state of Missouri.

"I am wondering if you have any rulings in this respect, and if you would be kind enough to let me have your opinion in this matter so that I may proceed to protect the interest of the state of Missouri in this matter, if any."

Section 253 of R. S. Mo., 1939, provides for the handling of the estate of a non-resident decedent who left a will and for the disposition of a non-resident decedent's estate, where such non-resident decedent died intestate, as follows:

" * * *; and if there should be no such will, his real estate shall descend according to the laws of this state, and his personal estate shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant."

The common law on this question is clearly stated in Richardson v. Lewis, 21 Mo. App. 531, as follows:

" * * * We rest our decision upon the universal principle of the common law that the succession of the personal property of a deceased person is governed exclusively by the law of his actual domicile at the time of his death. Story on Conflict of Laws, sect. 481; Ennis v. Smith, 14 How. (U. S.) 400, 425; Wilkins v. Ellett, 9 Wall. 740; Parsons v. Lyman, 20 N. Y. 103, 112; Fay v. Haven, 3 Met. (Mass.) 109, 114; Enoch v. Wylie, 10 H. L. Cas. 1, 13, 19; Daglioni v. Criopin, L. R. 1 H. L. 301; Shannon v. White, 109 Mass. 146.

'This doctrine is of such general recognition and is founded in such strong considerations of commercial policy and convenience, that it has been said to be a part of the jus gentium. Mr. Justice Wayne, in Ennis v. Smith. Our statute relating to the administration of the estates of deceased persons does not impair this rule, but confirms it, by providing that in the case of a non-resident decedent 'his personal estate shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant.' Revised Statutes, section 268."

In the absence of an act of law that would take precedence over Section 253, it seems that the property of a non-resident would be disposed of according to the provisions of

said section above quoted.

We find Section 620 of R. S. Mo., 1939 relating to the "Escheats of the Estates" which seems to be applicable under these circumstances and which is as follows:

"If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same; or, if upon final settlement of an executor or administrator, there is a balance in his hands belonging to some legatee or distributee who is a non-resident or who is not in a situation to receive the same and give a discharge thereof or who does not appear by himself or agent to claim and receive the same * * *, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

Section 620 might even be considered a special act, in that it limits the application of the law on escheats to only the particular circumstances and conditions set out therein.

The history of Section 620 supra reveals that the law on escheats was entitled "an act concerning escheats" approved December 18, 1824, and was carried into the Revised Statutes of 1825, pp. 356-361, which act remained the law of this state on escheats until said act was repealed and a new act adopted which constituted the law in its present form, and approved May 11, 1899 which appears in Laws of Missouri 1899.

Therefore, if there is a conflict between these two sections, Section 620 would take precedence over Section 360, and would be controlling.

The two sections should be construed together, so as to give effect to all, if possible, without going contrary to the manifest intention of the legislature. The law on this subject is declared in White v. Greenway, 263 S. W. 104, 303 Mo. 691:

"Section 540 was enacted in 1919, after the other sections quoted had been in effect, and does not expressly repeal any part of them. All these sections quoted appearing in the last revision must be construed together so as to give effect to all of them if it can be done without going contrary to the manifest intention of the Legislature. Is it possible to reconcile them? Sections 253 and 537 expressly re-

quire a will to be executed according to the law of this State before it is effective to pass real estate. The question is whether Section 540 may be harmonized with them, or whether by implication it repeals so much of Sections 253 and 537 as makes that requirement.

"A repeal occurs by implication only when necessity demands it. (State ex rel. v. Wells, 210 Mo. 1. C. 620; Manker v. Faulhaber, 94 Mo. 440; 26 Cyc. pp. 1073-1077.) The opinion in the Wells Case quotes from a textbook, as follows:

"A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy." (Anderson's Law Dict., p. 879.)"

Section 253, supra plainly provides that the real estate of a non-resident decedent dying intestate shall descend according to the laws of this state, and that his personal property shall be distributed according to the laws of the state of which he was an inhabitant.

Section 620 enumerates the conditions and circumstances under which property shall escheat to the state. Under this section, if it applies, it seems that the personal property would also escheat to this state, because the deceased died "intestate, seized of real and personal property, and leaving no heirs or representatives capable of inheriting". This is true if the words, "representatives capable of inheriting" do not include the administrator of the decedent's estate in the state of which he died an inhabitant.

The term "representative" may include administrators. In the case of Lee v. Dill, N. Y. 16 Abb. Proc. 92, the court held that a representative is one that stands in the place of another, as heir, or in the right of succeeding to the estate by inheritance; one who takes by representation; one who occupies another's place and succeeds to his rights and liabilities.

Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter being ordinarily the executors or administrators. The term "representatives" includes both classes. When the personal representatives at law are intended in a statute, they are so named; and there is no expression of an intent to limit the protection and benefit of this exception to the personal representatives. The words "representatives of a deceased person," in Code, Section 399, as it stood prior to the amendment of 1862, allowing parties to be examined as witnesses, except against parties who are representatives of a deceased person and the witness, includes both real and personal representatives.

In the case of Briggs v. Walker, 19 S. Ct., 171 U. S. 466, 43 L. Ed. 243, the court held that "the primary and ordinary meaning of the words 'representatives', or 'legal representatives', or 'personal representatives', when there is nothing in the context to control their meaning is 'executors and administrators'; they being the representatives constituted by the proper courts". The same conclusion was reached in Thompson v. Smith, 103 Fed. 936, 123 A. L. R. 76.

However, the words "representatives" and "legal representatives", in the case of In re: Blazej's Estate, 23 N. Y. S. (2d) 388 were held, when used in a statute providing for descent and distribution, to mean children and children of deceased children and does not include the surviving spouses of a deceased child.

The word "inherit" generally is taken to mean to take as an heir at law by descent or distribution from an ancestor. Warren vs. Prescott, 84 Me. 483, 17 L. R. A. 435 gives this general definition which has since been accepted as the strict technical definition of the term. However, the case of Higby v. Martin, 167 Okl. 10, 28 Pac. (2d) 1097 holds that the word "inherit" is often used as meaning "to become possessed of". In re: White's Estate, 84 Pac. 831, 42 Washington 360, quoting Century Digest, held that the word "inheriting" is used in law "in contra distinction to acquiring by will, but in popular sense, this distinction is often disregarded; * * * to receive by transmission in any way; having imparted to or conferred upon; acquire from any source".

While it is not necessary here to decide, it seems that under these definitions, Section 620 could be reconciled with Section 253 on this point.

February 3, 1943

That part of Section 620, which is as follows "or if upon final settlement of an executor or administrator, there is a balance in his hands belonging to some legatee or devisee who is a non-resident or who is not in a situation to receive the same and give a discharge thereof, or who does not appear by himself or agent to claim and receive the same" is not reconcilable with Section 253. Emphasis is placed upon this part of the statute by the last part of said section by the provision "in each and every such instance such real and personal estate shall escheat and vest in the state, * * *".

Even if the word "or" between the words "non-resident" and "who" and between the words "thereof" and "who" would be construed to mean "and", such construction would still leave this part of Section 620 repugnant to Section 523, because the administrator in Kansas would not be a legatee or devisee who could appear in person or by agent.

CONCLUSION

It is therefore, our conclusion that the real and personal property of a non-resident decedent who died intestate, leaving no heirs capable of inheriting will escheat to the State of Missouri under Section 620 of R. S. Mo., 1939. It is not necessary for us to conclude that any part of Section 253 is repealed by implication by Section 620. It seems that there will be nothing to prevent the domiciliary administrator from asserting a claim for said property after it has been paid into the escheat fund of the state. Chapter III, Article 1 provides for the making of such claim.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

LAP:wb

APPROVED:

ROY MCKITTERICK
Attorney General

INCOME TAX: Section 11375, R. S. Mo. 1939, prohibits the examination of income tax returns or records for the purpose of obtaining information in connection with the collection of sales tax.

May 22, 1943



Mr. H. B. Lemonds
County Clerk
Kennett, Missouri

Dear Mr. Lemonds:

This department is in receipt of your letter of recent date, in which you request an opinion. Your letter is as follows:

"The question of whether or not the sales tax collectors have the authority to check on the income tax returns filed in the county clerk's office has arisen.

"We would appreciate your opinion on this matter. "

Section 11375, R. S. Mo. 1939, is as follows:

"It shall be unlawful for any person, persons or officers to divulge, give out or impart to any other person, or persons, any information relative to, or the contents of any income tax return filed under this article, or to permit any other person, or persons not connected with his office to see, inspect or examine the same; and it shall be unlawful for any person or officer to use any income tax return filed under this article in any manner whatever in connection with, or for the purpose of assessing of property tax or determining the amount of assessment of any person or corporation or to use the same in any way in making up an assessment roll. It shall be unlawful for any board of equalization, or any member thereof, or any officer to in any way permit the inspection of any such return or

May 22, 1943

to use the same in any way in making assessments other than the assessment of the tax provided for in this article, and any person violating the provisions of this section shall be deemed guilty of a felony and upon conviction thereof shall be fined a sum of not less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000) or by imprisonment in the penitentiary for a term of not less than two years and not more than five years, or both such fine and imprisonment as the court may deem proper; and any officer convicted for the violation of this section, the judgment of conviction shall be construed and held to be a forfeiture of the office held by such convicted person: Provided, however, that this shall not apply to the state auditor, his agents or inspectors in the discharge of their official duties in the administration of the income tax laws. The state auditor, his agent or inspector, shall have power to and be permitted to examine any income tax return on file in the office of any county or township assessor, county collector, county treasurer or the assessor, auditor or comptroller of the City of St. Louis."

We submit herewith an opinion rendered by this department on November 3, 1934, written by Hon. John W. Hoffman, Jr., Assistant Attorney General, which covers the general question as to the divulging of information contained in income tax returns.

In discussing the statute above quoted, as it existed in the Laws of Missouri, 1919, the Supreme Court of Missouri en banc, in the case of State ex rel. Monier et al v. Crawford, 262 S. W. 341, 1. c. 343, made the following statement:

"* * * For instance, section 13135, R. S. 1919, directly forbids the inspection of income tax returns in the clearest and most positive language. * * * * *"

This section was amended in 1925 by adding the following:

"* * * * * Provided, however, that
this shall not apply to the state auditor,
his agents or inspectors in the discharge
of their official duties in the administra-
tion of the income tax laws. The state
auditor, his agent or inspector, shall have
power to and be permitted to examine
any income tax return on file in the office
of any county or township assessor, county
collector, county treasurer or the assessor,
auditor or comptroller of the city of St.
Louis."

The persons referred to in your letter, we presume
are employees of the state auditor charged with assisting in the
collection of sales tax. However, the proviso last above
quoted gives the state auditor, his agents and inspectors the
right to examine income tax returns "only in the discharge
of their official duties in the administration of the income
tax laws."

The general statement contained in the last sentence
in the above quotation is limited by the specific statement
limiting the right to the inspection of returns to those
charged with the administration of the income tax laws.

On the question of construing statutes, the Supreme
Court en banc, in the case of Keane v. Strodtman, Sheriff,
18 S. W. (2d) 896, 1. c. 898, declared the law to be as
follows:

"The nature of the law, and the absence of
the enumeration from the charter of the
calling sought to be taxed, precludes the in-
voking of the supplemental clause of article
20 of the charter to 'piece out' the power
of the city in the imposition of the tax. The
familiar maxim of 'expressio unius est exclu-
sio alterius' may also be invoked, for the
maxim is never more applicable than in the
construction of statutes. Whitehead v. Cape
Henry Syndicate, 105 Va. 463, 54 S. E. 306;
Hackett v. Amsden, 56 Vt. 201, 206; Matter
of Attorney General, 2 N. H. 49."

May 22, 1943

Again in the case of McClaren v. Robins & Co., 162 S. W. 856, 1. c. 858, the Supreme Court defined the "ejusdem generis" rule as follows:

"* * * The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified. Keane v. Strodtman, 323 Mo. 161, 18 S. W. 2d 896; Mangelsdorft v. Pennsylvania Fire Insurance Company, 224 Mo. App. 265, 26 S. W. 2d 818; Puritan Pharmaceutical Company v. Pennsylvania Railroad Company, 230 Mo. App. 848, 77 S. W. 2d 508."

In view of the policy of law discussed in Mr. Huffman's opinion attached hereto, and the above quoted authorities, it seems that the powers given the State Auditor and his agents or inspectors would be strictly construed, and that it was the intention of the Legislature to grant them the right of inspection only in connection with the enforcement and administration of the income tax laws.

CONCLUSION

It is the opinion of this department that no one other than the taxpayer has the right or authority to inspect income tax returns, except the State Auditor, his agents and inspectors in the discharge of their official duties in the administration of the income tax laws.

Yours very truly,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:NH

TAXATION - (

SALES TAX (

Charges for use of skates at a skating rink are not subject to sales tax, but if charge is made to go on floor to skate, it is taxable.

September 11, 1943

Honorable Harry T. Limerick, Jr.,
Member, Missouri House of Representatives
Columbia, Missouri

FILED

53

Dear Sir:

This is in reply to yours of recent date wherein you submit the following request:

"Confirming my telephone conversation with you this morning in which I raised the question of whether the sales tax applied to roller rinks not charging admission but charging those who used the floor for skating purposes. It has been my opinion that where an admission is not charged and the charge is only made for the users of the floor for skating that no tax would be due. The same as bowling alleys or pool tables. I know the rules and regulations of the department exempt pool tables and bowling alleys. I can see no distinction between the two. I will appreciate it if you will advise me what your opinion is."

In our opinion dated August 21, 1937 to Mr. Orr we concluded as follows:

"The Legislature having failed to embrace within the definition of the term 'sale at retail' in Section 1 of the Act, those who play in games of Billiard, Pool, Bowling or any other game for which the participants pay a fee or charge to the proprietor for the use of the equipment, and having failed in Section 2 of the Act to levy and impose a tax upon the amount paid for the use of tables, balls and alleys by those who participate in games and athletic events, and by a strict construction of the Sales Tax Act, so far as it applies to the aforesaid subjects,

Sept. 11, 1943

but not such a strict construction as to destroy the intention of the Legislature, it is the opinion of this department that the amount which a party pays for the use of the tables, balls or alleys or for any other paraphernalia used in playing games, or the amount a party pays for playing pool, billiards, bowling or any other game or athletic event in which he participates as a player is not subject to the provisions of the 2% Sales Tax Act and is not taxable under the Act. "

By this opinion we held that where the charge is for the use of the paraphernalia used for gaming or recreation, then the sales tax is not chargeable.

However, you state in your letter that the charge is made to those who go on the floor.

Sub-section "1" of Sub-Section "G" of Section 11407, R. S. 1939, provides as follows:

"Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events."

If the charge is made in the skating rink for the privilege of going onto the floor to skate then we think the charge would be taxable. However, if the charge is for the use of the skates on the floor, then under the Err opinion the transaction would not be taxable.

C O N C L U S I O N .

From the foregoing it is the opinion of this department that the moneys collected at a skating rink for the use of skates and the floor for skating, are not subject to the sales tax, but that if a charge

Hon. Harry T. Limerick, Jr. -3-

Sept. 11, 1943

is made for going on to the skating rink floor that
such charge is subject to the tax.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

TWB:LeC

APPROVED:

ROY McKITTRICK
Attorney General

MUNICIPALITIES: May impose license tax on resident operators of motor vehicles or operators doing business within the city.

May 8, 1943



Mr. Edward V. Long
Attorney at Law
Blair Building
Bowling Green, Missouri

Dear Sir:

We are in receipt of your opinion request under date of April 13, 1943. Said request reads in part:

"Please get me an opinion as to whether or not a City of the 4th Class like Bowling Green can collect city automobile licenses from a P.S.C. Carrier like Robertson Motor Freight Service whose home terminal is located here."

Your problem seems to come within the scope of Section 7196, R. S. Missouri 1939. Said section applies to cities of the fourth class and enumerates many things and activities upon which the mayor and board of aldermen have power and authority to regulate and license. Said section, in its applicable parts reads:

"The mayor and board of aldermen shall have power and authority to regulate and to license and to levy and collect a license tax, express companies * * *
* * * * *
carts, drays, transfer and job wagons,
* * * * * and all other vehicles, * * *
* * * * * to license, tax and regulate hackmen, draymen, omnibus drivers, porters and all others pursuing like occupations, with or without vehicles, and to prescribe their compensation; * * * * *"

May 8, 1943

While there is no express mention in said statute of motor freight service, under the rule of ejusdem generis the Robertson Motor Freight Service undoubtedly comes within the scope of said section. The rule of ejusdem generis is applied in the case of *Wonner v. Carterville*, 125 S. W. 861, there the court explained the rule as being that where general words followed particular words in the statute the rule will be applicable to those of the same general character or class in order to effectuate the legislative intent. Under this theory the Robertson Motor Freight Service certainly comes within the statute.

A city's authority to tax has been held to be confined to statutory or constitutional power. In the case of *Siemens v. Shreeve*, 296 S. W. 415, 1. c. 416, in discussing license tax of this nature the court said:

"It is conceded that the license tax here sought to be imposed is an attempted exercise of the taxing power, and not a police regulation. A city has no inherent power to tax. This power rests primarily in the state and may be delegated by constitutional provision or by statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred, and in case of doubt the power is denied. * * * * *"

The authority necessary for Bowling Green, Missouri, to impose this city automobile license is found in Section 7196, R. S. Missouri 1939.

Ordinances of this nature have been held to be a revenue measure, not a police measure. In *City of Lebanon v. Joslyn*, 58 S. W. (2d) 289, 1. c. 290, the court in discussing a license tax in the nature of which you write, said:

"* * * * *we may say that the ordinance of the city of Lebanon is not a police regulation. It is purely a revenue measure. The city of Lebanon is a city of the fourth class. * * * * *"

There are numerous cases that hold where non-residents operate within the city, vehicles of various types, the city cannot

May 8, 1943

impose license tax for such activity. Prior opinions of this office are also in accord with that doctrine. In support thereof see *City of Ozark v. Hammond*, 49 S. W. (2d) 129.

Two early cases approving a license tax enacted upon vehicles by a city are the *City of St. Louis v. Greene*, 70 Missouri 562, *City of St. Louis v. Woodruff*, 71 Missouri 92. In the case of *City of St. Clair v. George*, 33 S. W. (2d) 1019, the St. Louis Court of Appeals held that the driver of a truck transporting merchandise from a grocery company to a store in another city was not subject to a license tax imposed by such city. In that case, 1. c. 1021, the court said:

"We conclude that defendant in the present case was not carrying on the business of transporting merchandise within the limits of the city of St. Clair, and was not subject to the imposition of a license tax by said city."

The two tests as to whether or not one is subject to a license imposed by the city upon activities of this nature, are: (1) is the licensee a resident within the city, (2) or doing business within the city? Unless one of those two tests is satisfied the later cases seem to hold that the motor vehicle used in the activity is not subject to license.

In your question you state that the Robertson Motor Freight Service's home terminal is located in Bowling Green, Missouri. This office believes that such fact, if it does exist, is sufficient to establish the residence of the Robertson Motor Freight Service Company as being in the City of Bowling Green, Missouri, and therefore subject to a license tax enacted by the city, under the authority conferred upon said city by Section 7196, *supra*.

CONCLUSION

The City of Bowling Green can collect city automobile licenses from a common carrier whose residence (home terminal) is within the corporate limits of said city or from a common carrier doing business within the corporate limits.

Respectfully submitted

APPROVED:

WILLIAM C. BLAIR
Assistant Attorney General

ROY McRITTRICK
Attorney General of Missouri

SCHOOLS: Tally sheets and ballots for the election
ELECTION OF COUNTY for county superintendent of schools.
SUPERINTENDENT OF
SCHOOLS:

January 22, 1943

Mr. Chester R. Lyle
County Clerk
Nodaway County
Maryville, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you submit the following:

"Will you kindly advise us on the following: should the poll books for the County School Superintendent's election be numbered and should this number be written on the back of the ballots and the black sticker placed over the number on the back of the ballot?"

The procedure for the election of a county superintendent of schools is prescribed by statute. Under Section 10609, R. S. Mo. 1939, which applies to this subject, it is provided as follows:

"There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; * * * * *"

It will be noted that this section provides that the superintendent of schools shall be elected at the annual district school meetings.

Section 10610, R. S. Mo. 1939, also applicable to this subject, provides in part as follows:

"At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the clerk of the county court shall mail by registered letter to the president or clerk of the board of school directors of the various districts of the county a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall, so far as practical, conform to the form of poll books set out in section 11490, article 2, chapter 76, R. S. 1939, relating to general elections, and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two justices of the peace or two qualified voters of the county, and cast up the vote and issue a commission to the person re-

ceiving the highest number of votes, for which commission he shall receive a fee of one dollar to be paid by the person commissioned. A tie vote shall cause a vacancy in the office of county superintendent, which shall be filled by appointment by the governor, and the person so appointed shall hold such office till the next annual school meeting and until his successor is elected and qualified. In case a school district is divided by a county line, the county clerk shall transmit to the president or clerk of the board of directors of such districts two sets of tally sheets, and the voters residing on each side of the line shall vote separately and returns shall be made to each county as herein provided. For transmitting the returns of such election, the chairman of the annual meeting shall receive the sum of one dollar to be paid out of the incidental fund of the district. The provisions of this article shall, so far as practicable, apply to village and city elections so far as affects the election of county superintendent of public schools and so far as not conflicting with existing laws, which are sufficient to safeguard such elections. * * * *

It will be noted that this section provides only for tally sheets and nothing is said about poll books. It will also be noted that this section provides that these tally sheets in so far as practicable shall conform to the form of poll books set out in Section 11490. Section 11490, R. S. Mo. 1939, describes the poll books and prescribes for numbering and naming of the voters who are listed in the poll book. By using this form the tally sheets used in Section 10610 should contain the number and name of the voter. In the last sentence quoted above as a part of Section 10610, supra, it will be noted that this language is used: "The provisions of this article shall, so far as practicable, apply to village and city elections so far as affects the election of county superintendent of public schools and so far as not conflicting with existing laws,

which are sufficient to safeguard such elections."

Section 10483, R. S. Mo. 1939, which applies to elections in towns, cities and consolidated school districts, is as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock a. m. and closing at 6 o'clock p. m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board: Provided, that in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants, in counties containing not less than two hundred thousand nor more than four hundred thousand inhabitants according to the last national census, said elections may at the option of the board be held at the same time and places as the election

for municipal officers and in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants in other counties, said elections shall be held at the same time and places as the election for municipal officers, and the judges and clerks of such municipal election shall act as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose. * * * * *

In so far as the election officials and the conduct of the election is concerned, we think this section applies to the election of county superintendent of schools in cities, towns or consolidated school districts. In other words, the election is conducted in the same manner as the election for state and county officers.

Under the provisions of Section 10610, supra, which section is especially applicable to the county superintendent of schools, as stated above, it will be noted that the law-makers intended that the article applicable to the election of county superintendent of schools should apply to city and village elections so far as affects the election of county superintendent of schools, and so far as not conflicting with existing laws which are sufficient to safeguard such elections. So, it seems from this statement that the lawmakers did not intend to change the procedure for elections in cities, towns and consolidated school districts, if such elections are sufficient to safeguard the elections of county superintendents of public schools. It seems that it would be practical for the provisions of Section 10610, which requires the use of tally sheets, to apply to village and city elections in so far as the election of county superintendent of schools is concerned. This section makes it the duty of the members of the board of directors and chairman and secretary of the annual school meeting, to see that each ballot so cast is counted for the person receiving same.

Under said Section 10483, supra, three judges of election and two clerks for each voting precinct are the officials who conduct the election in cities, towns and consolidated school districts. The provisions of Section 10610 seem to conflict with the provisions of Section 10483. However, the provisions of Section 10483 are sufficient to safeguard the election of county school superintendent. Under Section 10483, R. S. Mo. 1939, the school election in cities, towns and consolidated school districts, is conducted in the same manner as elections for state and county officers. In elections for state and county officers ballots are numbered. Under Section 11499, R. S. Mo. 1939, the ballot is numbered before it is placed in the ballot box. In our research we do not find the law so definite as to the numbering of a ballot in precincts other than those in cities, towns and consolidated school districts. However, under Section 10610 the tally sheets must conform to the poll book provided in Section 11490, R. S. Mo. 1939, which provides for a number to be placed before the name of each person listed on the tally sheet. This number on the tally sheet would serve for no purpose if the ballot cast by such voter did not have the same number upon it. We must assume that the lawmakers did not enact a useless law when they required the tally sheets to be numbered.

In order for the board of directors and the chairman and secretary of the annual meeting to see that each ballot shall be counted for the person for whom it is cast under Section 10610, it would be practical and almost essential to place the voter's number on the ballot which he casts. While the statute is silent in definitely stating that the ballot should be numbered, yet when we consider the provisions that the tally sheet shall have a number before the name of such voter, the general law applicable to cities, towns and villages, and consolidated school districts, and the provisions that the officials at the annual school meetings shall see that the ballots cast are counted for the person for whom they are voted, then we think that all ballots should be numbered with the same number which is placed before the voter's name on the tally sheet.

It is, therefore, the opinion of this department that the tally sheets used for the election of county school superintendents should be numbered and the number of the voter

Mr. Chester R. Lyle

-7-

1-22-43

listed on the tally sheet should be written on the back of the ballot voted by the voter.

On the question of the use of the black stickers in such an election, we are enclosing copy of an opinion written by this department to Hon. H. Tiffin Teters, under date of March 6, 1942.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

SHERIFFS: In a county of 18,000, the sheriff, and not the county pays the jailer.

January 22, 1943



Mr. Joe Lyons
Sheriff
Carroll County
Carrollton, Missouri

Dear Sir:

This is in reply to your request for an opinion, under date of January 19, 1943, which reads as follows:

"Carroll County has a population of 18,000. Am I authorized to employ a jailer at the expense of the County, provided such expense is set up in the County Budget?"

According to the last federal census, the population of Carroll County was 17814. By reason of this population the sheriff of Carroll County is not on a salary, but on a fee basis. The appointment of a jailer is provided for in Section 9195 R. S. Missouri, 1939, which reads as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Mr. Joe Lyons

-2-

January 22, 1943

The duties of the jailer are set out in Section 9196 R. S. Missouri, 1939, which reads as follows:

"It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

Deputy jailers may be appointed by the sheriff as provided in Section 9211 R. S. Missouri, 1939, which reads as follows:

"Such deputy shall be appointed by the sheriffs, and shall be under their sole direction, and be removable by them at pleasure."

Since the sheriff of Carroll County is not on a salary, but is on a fee basis, he receives his fees as set out in Sections 13411, 13413 and 13414 R. S. Missouri, 1939.

Section 13415 R. S. Missouri, 1939, reads as follows:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

Section 13416 R. S. Missouri, 1939, reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

After a careful search, we find no provision for the payment of a jailer by the county court, and the only way that a jailer could be paid by a sheriff would be out of the fees collected by him as sheriff.

It was held in the case of *Moutier v. Stumpe*, 39 Mo. App. 161, that a jailer was not merely an employee of the sheriff, but held an independent official position. Where a jailer is an official, he must point to the statute which allows him compensation in any manner. Since the legislature did not enact a law creating a salary for a jailer, in counties such as Carroll County, then he must obtain his compensation from the fees allowed him for certain duties performed, such as providing prisoners with food.

In the case of *Moutier v. Stumpe*, supra, the court at 1. c. 164, said:

"Section 6078 reads as follows:

'Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailor shall provide such prisoner with food, for which he shall be allowed a reasonable compensation to be fixed by law.'

"Other provisions of the statute make it the duty of the sheriff or keeper of the jail to receive prisoners from other counties where there are no jails, and to produce them before the circuit courts of the counties appointed for the trial of such prisoners; and in case of a failure or refusal to discharge the duties thus imposed the sheriff or keeper of the jail shall be deemed guilty of contempt and be punished by fine and imprisonment in the county jail, etc. And in this connection, section 6094 provides as follows: 'The said sheriff or keeper of the jail may, also, in the discretion of the said court, be removed from office, and rendered incapable of holding or executing the same thereafter.'

"The idea that the jailor of a county is only the servant or employe of the sheriff cannot be harmonized with the foregoing provisions of the statute. It is true that the jailor owes his position to the sheriff, and it is equally true that he holds it during the pleasure of his superior, but this does not necessarily make him a servant or employe. That the keeper of a county jail holds an inde-

pendent official position, is to be gathered from the entire statute on the subject, and it is rendered incontrovertible by section 6094, which expressly provides, that the keeper of the jail may, by an order of court, be removed from office, and rendered incapable of holding or executing the same thereafter. The sheriff himself may act as jailor, but, when he appoints some one else to the position, he thereby creates an independent official, upon whom the statute imposes certain official duties. It follows from this that the plaintiff's compensation for boarding the prisoners did not depend upon any private contract with Ehlers, but was fixed and regulated by section 6078, supra, which provides, that, if the jailor of a county shall furnish any prisoner with board, he shall be allowed therefor such compensation as shall be fixed by law."

In the above quotation, it is very noticeable that in each of the sections therein set out it provided " * * * he shall be allowed a reasonable compensation to be fixed by law, * * * ", etc.

All county officers must be able to point out the statute which allows them fees or salary. It was so held in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860, where the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is

Mr. Joe Lyons

-6-

January 22, 1943

provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656,

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

It is, therefore, the opinion of this department, that the sheriff of Carroll County is not authorized to employ a jailer at the expense of the county, and the county is not authorized to pay a jailer a certain salary.

APPROVED:

Respectfully submitted

W. J. BURKE

Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

OFFICERS: Induction into the armed forces does not
CIRCUIT effect title or compensation.
CLERK:

February 17, 1943

Honorable Mace Maness
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Mrs. Maness:

The Attorney-General desires to acknowledge receipt of your letter of February 12, 1943, in which you requested an opinion from this office. The request, omitting salutation and signature is as follows:

"The Circuit Clerk and ex-officio Recorder of this county expects to be called to the service in the near future. He would like to know if he can continue to handle his office and receive the compensation therefor, leaving the office in charge of his deputy and employing an assistant who would be paid by the clerk out of his salary.

"I would appreciate an opinion on this."

It has been definitely settled in this State that the induction of a county officer into the armed forces under the Selective Service Law does not effect the office where the officer has a deputy that may perform the duties of the office. This was decided by the Supreme Court en banc in the case of State ex inf. McKittrick v. Wilson, number 38087. Decision was rendered December 7, 1942. The facts of this case were that John Wall was the elected and qualified Cir-

February 17, 1943

cuit Clerk of Henry County having a properly appointed and qualified deputy. Wall was inducted into the Army under the Selective Service Law and for a few weeks was at Ft. Leavenworth and made weekly trips back to Henry County where he was in and about the office supervising the work and advising his deputy. Later, he was removed to California and could not continue to make these weekly trips back to Henry County. As there were a number of cases similar to this one where officers had been inducted into the armed forces and the law was not definitely settled as to the effect of induction, the Governor considered it advisable that a test case should be tried to determine the question. Accordingly, he appointed Wade Wilson Clerk of the Circuit Court of Henry County and issued to him a commission advising this office of the appointment and directing that a suit be brought to oust his appointee. The suit was brought and decision rendered as heretofore indicated. From the decision in the case the following brief quotation is taken:

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

In addition to this quotation to which we are calling attention a mimeographed copy of the decision is herewith enclosed.

Hon. Macey Maness

-3-

February 17, 1943.

The Circuit Clerk and Ex Officio Recorder of Ripley County with the consent of the Circuit Court may appoint one or more deputies. Section 13299 R. S. Mo., 1939:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

From your letter it is inferred that the clerk has appointed a deputy. If this was true then under the Wilson Case his induction into the Army would have no effect upon his tenure of office.

In regard to your inquiry concerning the compensation attached to the office difficult questions frequently arise where there is a controversy over the compensation of the office between a de jure officer and a de facto officer. Under the facts as stated by you there would be no controversy of this nature, and the duly elected and qualified circuit clerk and ex officio recorder would be entitled to the compensation for the compensation is merely incidental to the office. In support of this statement the following brief quotations are cited:

State ex rel. Vail v. Clark, 53 Mo. 508, 1.c. 512, 513:

" * * * * * The commission issued to the relator invested him with the title, and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law. State ex rel. Vail vs. Draper, 48 Mo., 213. He alone is entitled to the emoluments of the office, until the State, by a proper-proceeding, has revoked the authority with which it has invested him. Meanwhile the auditor cannot rightfully withhold the salary.
* * * * *

609: Givens v. Daviess Co., 107 Mo. 603, l.c. 608,

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. * * * * *

Bates v. St. Louis, 153 Mo. 18, l.c. 20:

"It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office. . . . "The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force

of any contract, but because the law attaches it to the office." * * * * *

28: State ex rel. Evans v. Gordon, 245 Mo. 12, 1.c.

"It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. * * * * *

136: American Jurisprudence, Vol. 43, Sec. 342, p.

"Compensation does not constitute any part of the public office to which it is annexed. It is a mere incident to the lawful title or right to the office, and belongs to the officer so long as he holds the office. When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary, fees, or emoluments prescribed by law. * * * * *

CONCLUSION

The induction of the Circuit Clerk and Ex Officio Recorder of Ripley County into the armed forces of the United States under the Selective Service Law will in

Hon. Mace Maness

-3-

February 17, 1943.

no way effect his tenure of office. It is suggested that if the clerk feels the deputy or deputies already provided for would not be able to take care of the duties of the office at all times he ask permission of the Judge of the Circuit Court to appoint another deputy to be paid by the clerk. By doing this the validity of acts done in the clerk's office could never be questioned as they might be if some person who was not properly deputized was in the office performing some of the duties.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS
enc. 1

SCHOOL: House Bill 94 increasing qualifications of county superintendent does not apply to those elected at April 6, 1943, school election.

March 10, 1943



Honorable Mace Maness
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Madam:

This will acknowledge receipt of your letter of March 9, 1943, as follows:

"Our present superintendent of schools has 65 hours of college work and has taught twenty years in public schools. It has been questioned whether or not she can qualify under the new law.

"It seems to me that the phrase 'or he shall be serving as county superintendent of public schools' clearly qualifies her, but I would like to have your opinion. She has an opponent, or one announced, who does not qualify, and he is causing her many anxious moments about her qualifications."

We have also received a telegram from Mr. Ray E. Swindel, Doniphan, Missouri, under date of March 8, 1943, as follows:

"I failed to ask whether this bill about the county superintendent would affect the April 6, election. I am the Democratic candidate for the office, my Republican opponent was appointed by Governor Donnell last October, neither of us has a degree. If elected, can I take office even if the bill becomes effective before July. Will those now in office be affected too."

House Bill 94, passed by the General Assembly and approved by the Governor on March 3, 1943, increases the qualifications

March 10, 1943

of county superintendent of schools. Under this law, said officer must be at least twenty-four years of age, have taught or supervised schools as his chief work during at least two of the eight years next preceding his election, or shall have spent the two years next preceding his election as a regular student in a recognized college or university. At the time of his election, he shall hold a certificate authorizing him to teach in the public schools of Missouri and "shall have completed at least one hundred and twenty semester hours of college work, including at least fifteen hours in the field of education, not less than five of which shall have been in school administration; or he shall be serving as county superintendent of public schools."

The part just enclosed with quotation marks are the new requirements.

Under Section 10609 R.S. Mo. 1939, the superintendent of schools is elected at the annual school meeting held on the first Tuesday in April 1943, and his term is four years from the first day of July next following his election.

This section is expressly repealed by House Bill 94, but said bill fixes the date of elections and commencement of the term the same as Section 10609.

Under Section 36, Article IV of the Constitution, House Bill 94 will not take effect until ninety days after the adjournment of the 62nd General Assembly (the present session). Since the General Assembly is still in session, it is not known just when House Bill 94 will become effective. Until it does become effective, Section 10609 R.S. Mo. 1939 is the law and governs the qualifications of county superintendent of schools.

Since the school election is now less than one month away, it is not possible for House Bill 94 to become effective before April 6, 1943. However, if the General Assembly should adjourn at any time before or on April 2, 1943, then House Bill 94 would be in effect on July 1, 1943 at the time the superintendent of schools, elected April 6, 1943, takes office, by qualifying. If this were to occur (and it is only a remote probability) then the question arises as to whether one elected superintendent of schools on April 6, 1943, who does not have the qualifications

prescribed by House Bill 94, can qualify and hold said office.

It is first to be noted that the new qualifications prescribed relate to the time of election.

Section 15, Article II of the Constitution provides:

"That no * * * law, * * * retrospective in its operation, * * * can be passed by the General Assembly."

In *Gast Realty & Investment Co. v. Schneider* 296 Mo. 687, 696, it is said:

"Sutherland speaks of retrospective statutes as those which 'relate to past acts and transactions,' * * *"

"Sedgwick defines a retrospective law to be: 'A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' * * *"

In *Willhite v. Rathburn* 61 S. W. (2d) 708 Mo. Sup. at l. c. 711, it is said:

"* * *The constitutional inhibition against laws retrospective in operation (section 15, article 2, Constitution of Missouri) does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested. A law must not give to something already done a different effect from that which it had when it transpired.* * *"

In *Graham Paper Co. v. Gehner* 59 S.W. (2d) 49 (Mo. Sup.) at l. c. 50, it is said:

"* * * A new or an amendment of an existing statute which reaches back and creates a new or different obligation, duty, or burden which did not exist before the new law itself became effective, or which makes the obligation or burden begin at a date earlier than the date of going into effect of the law itself, is retroactive in its operation and unconstitutional. A law is retroactive in its operation when it looks or acts backward from its effective date, and if it has the same effect as to past transactions or considerations as to future ones, then it is retrospective. * * *"

Clearly, House Bill 94, under the above authorities, even if it should become effective on or before July 1, 1943, cannot constitutionally apply to prevent a person having the qualifications prescribed in Section 10609 R. S. Mo. 1939, from being elected to and qualifying for the office of County Superintendent of Schools on July 1, 1943.

The above view makes it unnecessary to consider that part of House Bill 94 which apparently permits one "serving as County Superintendent of Public Schools" to be elected even though he may not have the new qualifications prescribed in said bill.

CONCLUSION

It is our opinion that House Bill 94 of the 62nd General Assembly has no effect upon a present incumbent, seeking re-

Hon. Mace Maness

5.

March 10, 1943

election to the office of County School Superintendent, or upon any other person seeking election to said office at the April 6, 1943 school election.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:AW

OFFICERS: Recorder of Deeds should not send out signed and sealed marriage licenses to Justices of the Peace to be used as needed, but should issue them himself upon request.

April 12, 1943

4/21



Miss Leoma Maddox
Recorder
Linn County
Linneus, Missouri

Dear Miss Maddox:

Your question, apparently, is whether or not the custom of the Recorder of Deeds, in sending out signed and sealed marriage licenses to Justices of the Peace can continue. Under Section 3364, R. S. Missouri 1939, the marriage license shall be obtained from the officer therein authorized.

"Previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, * * * * *."

Section 3365, R. S. Missouri 1939, specifically provides for the Recorder to issue the license.

"The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, * * * * *."

Section 3366, R. S. Missouri 1939, provides for the recording of licenses which are issued.

"The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, * * * * *."

Section 3367, R. S. Missouri 1939, provides the penalty for any default in the issuance, recording or returning of the license.

"If any recorder willfully neglect or refuse to issue a license to any person legally entitled thereto on application, on payment or tender of the fee provided for in the next preceding section, or shall fail or refuse to record such license, with the return thereon, as herein provided, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than five nor more than one hundred dollars. Every officer or person who shall fail to return a license within ninety days after the issuing of the same, or who shall make a false return thereon or any recorder who shall willfully make a false record of any marriage license or return thereon, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided in the preceding part of this section. "

In the case of State ex rel v. Moore, 70 S. W. 512; 96 Mo. App. 431, l. c. 435 and 436, the court ruled that it was the duty of the recorder to act under the statutes. The court specifically stated:

"* * * * *After a rather full examination of the entire marriage-license statute in all its length and breadth, we have been unable to escape the conviction that the Legislature intended that the licenses authorized by it should be placed on record by the recorder issuing them when issued, and in accordance with that conviction we must so rule. * * *

"* * * * * it would seem that a recorder provided with such a record book could without the least inconvenience record a license when issued by him, filling out a blank in his record of marriage licenses, and, later on, when the return is in fill out the blank for it immediately following the record of the license, and thus complete the record of both instruments. * * * * *

CONCLUSION.

It is the opinion of this office that in view of the above quoted sections it is the duty of the Recorder of Deeds to issue the licenses and under Section 3365, supra, to determine whether or not the persons applying for the licenses are legally entitled thereto. The practice of sending out signed and sealed marriage licenses prevents the Recorder from complying with this statutory mandate. It is the opinion of this office that this practice must stop immediately for the above stated reason.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

WCB:BAW

SHERIFF: In counties the size of Cole the sheriff is entitled to
FEE: three dollars (\$3.00) per day while actually in attendance
on the court. He may appoint, not to exceed three deputies
for such. Deputies are entitled to three dollars (\$3.00)
per day.

May 28, 1943



Mr. H. B. Mackey
Sheriff of Cole County
Jefferson City, Missouri

Dear Mr. Mackey:

This will acknowledge receipt of your request for
an opinion under date of May 26, 1943, which reads:

"I would like to have an opinion in
regard to Sheriff's fees for attend-
ing and waiting on the Circuit Court
of Cole County.

"I have been in the habit of charging
three dollars for opening the Court
and three dollars for the services of
the Regular Deputy attending the Court
and also three dollars for a Special
Baliff whom I very frequently have to
employ.

"The Honorable County Court of Cole
County has questioned my charge of
nine dollars per day; what I would
like to know is whether I am permit-
ted to charge for opening and attend-
ing Court; when I am allowed to use a
Deputy in addition to opening Court
and how many Deputies I am allowed to
use for it is impossible for me to wait
on the Court and take care of the duties
of the Sheriff's Office at the same time.
When Circuit Court is in session it is
necessary that I have a Baliff in the
Court room at all times; in this connec-
tion I would like to know who has the
authority to request the presence of the

May 28, 1943

Baliff. I have always paid the Baliff three dollars per day, by check and at the end of the regular term of Court have billed the County Court for the entire amount of charges for myself, the Baliff and one or two Deputies as the case may be.

"I would appreciate it very much if you will render, in writing, both the County Court of Cole County and myself your opinion as to when and how I am to proceed in the above - it will be a great help to all concerned in arriving at a definite understanding as to the legal and lawful authority."

Section 13411, R. S. Missouri 1939, allows the sheriff, in a county the size of Cole County, a fee of three dollars (\$3.00) per day for actual attendance on the court. This means you are allowed three dollars (\$3.00) every day you are in actual attendance upon the court. However, there is no fee for merely opening court. Furthermore, it is mandatory upon the sheriff to attend court except for illness or pressure of other official business. (See State v. Yager, 250 Mo., 1. c. 403) Section 13411, R. S. Missouri 1939, reads in part:

"Fees of sheriffs shall be allowed for their services as follows:

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day.....\$3.00"

Section 13133, R. S. Missouri 1939, authorizes the sheriff to appoint deputies with the approbation of the circuit court, which we construe to mean that whenever the necessity requires it the sheriff may select additional deputies. Although the judge of the court cannot select his own bailiff the selection of the sheriff must be approved by the circuit court. However, Section 13411, supra, limits the compensation for deputies to three dollars (\$3.00) per day each, not to exceed three deputies. Section 13133, supra, reads:

May 28, 1943

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Therefore, it is the opinion of this Department that as sheriff of Cole County it is mandatory that you be in attendance on the circuit court except for illness or pressure of other official business and that you are entitled to three dollars (\$3.00) per day for every day that you are in actual attendance on the court; that you, as sheriff of Cole County, when it is necessary, may appoint not to exceed three deputies actually employed in any one day in attendance upon the circuit court. Such appointments must be approved by the circuit court. For such deputies you, as sheriff, are entitled to a fee of three dollars (\$3.00) per day for each deputy, this being in addition to your own fee of three dollars (\$3.00) per day for actual attendance on the court.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

ARH:EAW

NEWSPAPER:

Failure to publish for four weeks will not disqualify a newspaper from being a legal publication under Sec. 14968, R. S. 1939.

September 28, 1943



Honorable A. Moody Mansur
Prosecuting Attorney
Richmond, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you submit the following statement and request:

"The question has arisen before the County Court and other officials of Ray County in regard to legal advertisements and orders of publication as provided in Section 14968, R. S. Missouri, 1939. The question has arisen in regard to the Hardin News published in Hardin, Missouri.

"My understanding is that said paper is a weekly publication. That a few months ago it ceased publication for about three weeks, during that time said paper was not published. The question has arisen since then, whether said newspaper can publish legal notices for the reason that it was not regularly and consecutively published for a period of three years.

"This newspaper has been published for many years and has carried legal publications in the past."

Section 14968 R. S. 1939, provides in part as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly, or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post-

office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years;" ****

We fail to find where this statute or a similar provision has been before our courts for construction. Literally construing this statute, it might be held that the publication must be each week for three years, in order to qualify under the act. However, the rule applied by the court in *State ex rel. Webster Groves Sanitary Sewer District v. Smith*, 115, S. W. 2d. 816, 823 should be applied here. It is, "In construing an act, the true intention of the framers must be followed, and where necessary, the strict letter of the act must yield to the manifest intent of the Legislature."

The Supreme Court of the State of Michigan in *Drabinski v. Brown*, 296 N.W. 538, 540 in considering a statute similar in purpose to Sec. 14968 supra, in speaking of the purpose of the legislation said:

"The main purpose of publication of legal notices is to give notice. The intent of legislature under statute relating to designation of newspapers for publication of notices of tax sales, requiring notice to be published in a regularly established newspaper which is regularly printed and published and has a regular circulation in county was to prevent the publication of legal notices in newspapers of limited circulation established solely for purpose of publishing such notices." ***

In that case the act required that in order for the newspaper to qualify to publish public notices it must have been printed, published and circulated for more than one year.

The court held the publication good even though the paper had not been printed as required by the statute.

In the case of, *In Re Tribune Publishing Co. of Palo Alto*, 108 Pac. 667, construction of a question

similar to yours was before the Court, the court said:

"*** Section 4460 defines a newspaper of general circulation as follows:
'A newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals in the state, county city, city and county, or town where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement.
***"

"The Palo Alto Tribune as above stated, was published weekly during a part of the period of one year preceding the filing of the petition in the superior court, and daily during the remainder of that period: and the single question presented for determination is: Can it be said under those circumstances that such newspaper was published at regular intervals for one year? It does not appear that the efficiency of a journal would be at all impaired by a change from weekly to daily publication. It might perhaps be said, in answer to the claim of the contestant that the publication in this case was irregular, that a newspaper published every day is necessarily published every week, and the argument could be made that a newspaper published weekly for nine months, and thenceforth daily for three months, has been published weekly for a year. But we think it unnecessary to resort to such an argument, for it appears plain to us, bearing in mind the purpose of the act as well as the language of the provision in question, that the publication in this case constitutes a publication at regular intervals for one year. The section does not require the interval between dates of publication to be equal from beginning to end, but it must be regular; that is, not spasmodic or occasional. ***"

Hon. A. Moody Mansur

-4-

Sept. 28, 1943

Also in the case of, In Re Lefavor v. Ludolph, 169 Pac. 412, held that the changing of the name of the newspaper did not change its character or destroy its identity as a legal publication.

C O N C L U S I O N .

Applying the foregoing here, we think the fact that a newspaper failed for four weeks to issue its paper would not disqualify such newspaper from being a legal publication in the provisions of Sec. 14968, supra.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

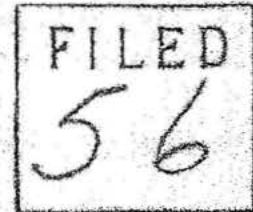
TWB:LeC

APPROVED:

ROY McKITTRICK
Attorney General

CRIMINAL LAW-- : In criminal prosecutions instituted
: by Prosecuting Attorney, county is
COSTS. : liable for costs even though Prosec-
: cuting Attorney does not file
: Information thereon.

October 1, 1943



Honorable A. Moody Mansur
Assistant Prosecuting Attorney
Richmond, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"The Circuit Clerk has requested an opinion from me in regard to payment of costs in criminal cases, where the Prosecuting Attorney files a complaint on his own information in a felony case and the defendant had a preliminary hearing by Justice Court and was bound over to Circuit Court for trial.

"However, the case was dismissed in Circuit Court by the Prosecuting Attorney without an information being filed. The defendant was charged under Section 4541 and 4542.

"I would also like to know, if your opinion 4225 applies only to Section 4224. I have understood that the State officials office has ruled that Section 4225 applies only to 4224. If that is correct, when the Prosecuting Attorney filed a complaint on a felony and the defendant discharged at the preliminary hearing, who would pay the costs in such action?"

In your request you indicate that the complaint in the case was made by the Prosecuting Attorney for a violation of Sections 4541 and 4542, R. S. 1939. The violation of Sec. 4541 constitutes a misdemeanor. The violation of Sec. 4542 constitutes a felony, but the punishment under the section ranges from a fine and jail sentence to imprisonment in the penitentiary.

If punishment under Sec. 4542 was only imprisonment in the penitentiary, then an acquittal of a charge under that section, the state would be liable for costs under section 4223.

Said section 4223 is as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It will be noted from the section that the county is liable for costs in all other trials on indictment or information in case of acquittal of defendant except when the prosecutor shall be adjudged to pay them, or it shall otherwise be provided by law.

Section 4224, provides that every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be liable for costs in case of acquittal.

Section 4225 provides that when such prosecutions are commenced by a public official that the county is liable for the costs in case of acquittal.

The case of State ex rel, Tudor v. Platte County Court, 40 Mo. App. 504 is somewhat in point on this question. In that case complaint for seduction, under promise of marriage of an unmarried person was signed by a private individual. The defendant was acquitted. The county was billed for the costs. The court held the county liable under Sec. 2095, R. S. 1879, which is now Sec. 4223, R. S. 1939. At l. c. 507, the court in ruling on the case said:

"***We find no other provision of the statute for paying them that that contained in the second division of section 2095, which we have quoted. No prosecutor has been adjudged to pay them; nor do we believe this

Oct. 1, 1943

to be a case where the prosecutor could be so adjudged, as it does not fall under either of sections 2096, 2098, 2099, 2100, or 2101, these being the only sections relating to a prosecutor's liability. Our opinion then, is, that the county should pay the relator's costs. ***"

Your question is some different from the Platte County case, supra, in that the Prosecuting Attorney filed the complaint here, but did not file an information after the defendant was bound over at the preliminary. Therefore we do not have the indictment or information mentioned in Sec. 4223, supra.

In the case of Ex Parte, Bedford, 106 Mo. 616, the Court held that the preliminary examination is a "criminal prosecution."

Applying that rule, then if the Prosecuting Attorney makes the complaint for a case for preliminary examination, we think such complaint would be in the same category as an indictment or information filed. Then if the Prosecuting Attorney fails to file information on the case in Circuit Court, and dismisses the case, we also think this is equivalent to an acquittal, in so far as the costs are concerned, under said Sec. 4223.

It might be contended that the Prosecuting Attorney is liable for the costs in a case where he files the complaint. However, we think this claim is definitely overcome by Sec. 3900, R. S. 1939, which is as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3895, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be

Oct. 1, 1943

liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case. "

The last sentence clearly indicates that the Prosecuting Attorney is not liable for costs in any case.

From a review of all the statutes on costs in criminal cases it seems that the lawmakers have tried to provide for payment of such costs, either by the defendant, the prosecuting witness, the state or the county.

In your case we find that there is no prosecuting witness who would be liable for costs; that the defendant is not liable nor is the state liable. Then we think this case would come within the provisions of Sec. 4223, making the county liable for the costs.

In connection with the question of costs in criminal cases, we are enclosing three opinions which this department has written on the subject, as follows:

Opinion, dated January 12, 1934, to Hon. T. J. Harper
Opinion, dated June 24, 1938, to Mr. Richard C. Ashby.
Opinion, dated Dec. 7, 1939 to Hon. C. Logan Marr.

C O N C L U S I O N .

From the foregoing, it is the opinion of this department that when a complaint is filed in Justice Court, by a Prosecuting Attorney, and the defendant

Hon. A. Moody Mansur

-5-

Oct. 1, 1943

is bound over to Circuit Court, and when the case is dismissed in Circuit Court by the Prosecuting Attorney without having filed an information, that the county is liable for the costs.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

TWB:LsC

APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS: Expenses of inspecting property which
is security on school loan cannot be paid
out of capital school fund.

February 9, 1943

Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri



Dear Sir:

This is in reply to your letter of February
5, 1943, which contains the following request for an
opinion:

"This county has money in the
Capital School fund which they
loan on real estate. In order
to make these loans it is neces-
sary that the court inspect the
land offered as security, which
necessitates all members of the
court viewing the land and most
of the time the court must drive
several miles to do this.

"Please advise me what if any of
these costs may be charged against
the Capital School fund since the
time given by the court and the ex-
pense of transportation is for the
benefit of the school fund."

Section 10376 R. S. Missouri, 1939, reads as fol-
lows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Under the above section, it is the duty of the several county courts of this State, to diligently collect, preserve and securely invest money and other property belonging to the county school fund.

Honorable Gordon J. Massey (3)

February 9, 1943

Section 10383 R. S. Missouri, 1939, reads as follows:

"Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent per annum, upon conditions and subject to the restrictions hereinafter set forth."

Section 10384 R. S. Missouri, 1939, provides the procedure of securing the county or township school funds.

Article XI, Section 6 of the Constitution of Missouri, reads as follows:

"The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will con-

sent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

It will be specifically noticed that this section prohibits the use or payment of the county school fund for any other use or purpose whatsoever, except for the maintaining of free public schools and the State University.

It can be said that it was the intention of the framers of the Constitution when they inserted "and for no other uses or purposes whatsoever" in the Constitution, and the intention of the legislature that the school funds should not be used, except for the maintaining of free public schools, when they enacted part of Section 10385 R. S. Missouri, 1939, which reads as follows:

" * * * In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

We find no provision for the payment of expenses of transportation for members of the county court in inspecting the land offered as a security.

Members of the county court, by accepting the office, must perform the duties imposed upon them, even though there is no provisions for the payment of expenses in performing any special duties.

It was so held in the case of Smith, Judge v. Pettis County, 136 S. W. (2d) 282, 1. c. 285, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * * "

Also, officers are required to perform their duties within the strict limits of their legal authority. It was so held in the case of Lamar Township v. City of Lamar, 261 Mo. 171, 1. c. 189, where the court said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with

them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority." (Underscoring ours.)

Also, in the case of Saline County v. Thorp, 88 S. W. (2d) 183, 1. c. 186, the court, in holding that public officers act as special trustees, with very limited authority in relation to funds, held in trust for the public for school purposes, said:

" * * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but

Honorable Gordon J. Massey (7) February 9, 1943

as special trustees with every
limited authority, and that every
one dealing with them must take
notice of those limitations. Mont-
gomery County v. Auchley, 103 Mo.
492, 15 S. W. 626." (Underscoring
ours.)

CONCLUSION

It is, therefore, the opinion of this department,
that the expenses incurred by the members of the county
court, in inspecting land offered as security on loans
made from the school fund, cannot be paid out of the
capital school fund.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

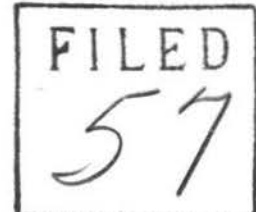
WJB:RW

COUNTY COLLECTOR:
TAXATION:

When County Collector entitled to credit for
delinquent taxes.

March 29, 1943

*Minced copy
7-27-54*



Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Osark, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion, under date of March 6, 1943, which reads:

"Trouble has arisen between the county court
and county collector. The county collector
wants credit for delinquent merchants license
where he has failed to get a sufficient bond.
Can the county legally relieve the collector
of these items.

"Please advise me what effort the county col-
lector must make before he is entitled to
credit for the uncollected personal and real
taxes which remain uncollected for the year
1942. I have read the statutes and think I
know but the court insists that I get an opin-
ion from you. The settlement is due this
month and I would appreciate an early reply."

We shall take up your inquiries in the order in which
they appear. You first inquire if the county court can
allow a credit in the county collector's settlement for a
delinquent merchant's license when said merchant failed to
give a good and sufficient bond as provided by statute. We
are attaching a copy of an opinion rendered by this Depart-
ment under date of February 10, 1942, to Honorable Leo J.
Harned, Prosecuting Attorney of Pettis County, Sedalia, Mis-
souri, which holds that before a county collector can re-
ceive credit by the county court for a delinquent merchant's
tax, that the collector shall exercise due diligence toward
collecting said merchant's license, and defines "due diligence"

March 29, 1943

as showing, " * * * that he has filed suit for the forfeiture of such merchant's bond, obtained judgment thereon, requested execution be issued thereon and that execution has been returned nulla bona."

If said collector failed to require of the merchant a good and sufficient bond as required in Section 11306, R. S. Missouri 1939 (see copy of attached opinion) then no doubt the county court could grant no leniency at all but require the said merchant's license be paid in full. Under Section 11307, R. S. Missouri 1939, it makes it a misdemeanor for failure of a collector to require such bond before issuing said merchant's license. Of course, it is a question of fact to determine if a bond is good and sufficient. We shall not go into that at this time since you have apparently determined that said bond if given was not a good and sufficient bond.

Therefore, we are of the opinion that if said collector fails to require a bond prior to issuing a merchant's license or fails to obtain a good and sufficient bond as required by law that he is entitled to no credit on his settlement until fully paid and furthermore makes himself liable for misdemeanor under Section 11307, R. S. Missouri 1939, for failure to require any bond.

You further inquire as to what effort the county collector must make before he is entitled to credit for uncollected personal and real estate taxes for the year 1942. Section 11086, R. S. Missouri 1939, requires the collector to diligently endeavor to collect all taxes within his means. He may seize and sell chattels of persons liable for taxes and no property whatsoever is exempt from seizure and sale for taxes due on either lands or personal property. Also, said collector shall not receive credit for delinquent taxes until he shall have made an affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent.

"The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person, liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property:

Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent: Provided further, that when any person owing personal tax removes from one county in this state to another, it shall be the duty of the county collector (or township collector as the case may be) of the county from which such person shall move, to send a tax bill to the sheriff of the county into which such person may be found, and on receipt of the same by said sheriff, it shall be his duty to proceed to collect said tax bill in like manner as provided by law for the collection of personal tax, for which he shall be allowed the same compensation as provided by law in the collection of executions. It shall be the duty of the sheriff in such case to make due return to the collector of the county from whence said tax bill was issued, with the money collected thereon."

Section 11089, R. S. Missouri 1939, provides that before allowing the county collector any credit for any delinquent lists the county court shall make special inquiry and be fully satisfied that he has used due diligence to collect same and that he could not find any personal property of the taxpayer out of which to make the taxes.

"At the term of the county court to be held on the first Monday in March, the collector shall return the delinquent lists and back

tax books, and in the city of St. Louis the uncollected tax bills and back tax books, under oath or affirmation, to such court, and settle his accounts of all moneys received by him on account of taxes and other sources of revenue, and the amount of such delinquent lists, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to him on his settlement. Before allowing the collector such credit for any delinquent lists, the county court shall make special inquiry and be fully satisfied that he has used due diligence to collect the same, and that he could not find any personal property of the taxpayer out of which to make the taxes. If the court is satisfied that there are any names on the lists of persons who have personal property out of which the taxes could have been made, it shall, in passing upon such lists, strike such names therefrom."

Section 11112, R. S. Missouri 1939, provides that the county collector shall sue for delinquent personal taxes. Section 11093, R. S. Missouri 1939, requires the county court to examine carefully and fully into collections made by the collector of delinquent and forfeited taxes, etc., from all sources. The latter section reads:

"The county court shall cause such settlement to be entered of record, so as to show the amount due the state and county, respectively. The record shall show the amount of state revenue and state interest fund taxes collected on the current tax books, and the amount of such returned delinquent thereon; also, the amounts of each collected on delinquent lists, amount of interest or penalty collected on delinquent lists, amounts collected on forfeited land lists, amounts of interest or penalty and costs collected on forfeited land lists, amounts collected on dramshop licenses, peddlers' licenses, billiard and other licenses; and the clerk shall report immediately the same to the state auditor, on blanks furnished to him by the auditor for that purpose. In making said settlement, the court shall carefully and fully

examine into all collections made by the collector of delinquent and forfeited taxes, penalties and costs thereon, and licenses from all sources whatsoever."

Likewise, Section 11091, R. S. Missouri 1939, also requires, the county court to examine carefully the county collector's settlement.

"The county courts, at the term for returning the delinquent lists, as provided in section 11089, shall carefully examine the settlements made by the collectors for all dramshop licenses, peddlers' licenses, billiard and other licenses, delinquent taxes and forfeited land taxes received by him since his last settlement."

Section 11109, R. S. Missouri 1939, makes unpaid taxes upon real estate a lien on such real estate. Section 11108, R. S. Missouri 1939, requires the county collector to enforce State's lien for delinquent taxes upon real estate.

"All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way effect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

Section 11110, R. S. Missouri 1939, requires the county collector to make a list of all taxes, both personal and real, that are delinquent and which he is unable to collect and which are shown on the tax books.

Section 11120, R. S. Missouri 1939, provides that within thirty days after the collector makes his settlement the county

clerk shall prepare a back-tax book showing all delinquent real estate taxes and charge the collector with same.

"Within thirty days after the settlement of the collector, in the odd numbered years, the several county clerks in each county in this state, and in such cities, the register, city clerk or other proper officer, shall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of land and town lots on which back taxes shall be due in such county or city, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited, and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax at the time of making said back tax book, together with the clerk's fees then due), in appropriate columns arranged therefor, and the aggregate amount of taxes, interest and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited; said back tax book, when completed, shall be delivered by said clerk or other proper officer to the proper collector of the county or such city, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the state auditor, and the clerk or other proper officer shall charge such collector with the aggregate amount of taxes, interest and clerk's fees contained in said 'back tax book'. In all cities the said 'back tax book' shall be made out, in alphabetical order, in the name of the owner, if known; and if the owner be not known, then in the name of the person to whom such tract or lot was last assessed. All taxes, interest and clerk's fees hereafter contained in the 'back tax book' herein described shall bear interest from the time of the making out of said 'back tax book' at the rate of ten per cent per annum until paid. In computing interest under this article, a fraction of a month shall be counted as a whole month."

March 29, 1943

"Due diligence" has been defined in the attached copy of the opinion previously rendered by this Department. In this instance we are of the opinion such term means that the county collector shall exert all effort possible under the above statutory procedure to collect said delinquent taxes and until this is done he can expect no credit by the county court. You will also notice that such seizure and sale of personalty under the above procedure is applicable also for the payment of delinquent real estate taxes. With respect to real estate, if the county collector has diligently endeavored to collect said taxes and has made his affidavit that he has been unable to do so, then the county court will credit him for such delinquent taxes. However, under Section 11120, supra, when the back-tax book for delinquent taxes is completed said taxes are again charged to the collector for collection. The procedure is well established for sale of real estate for delinquent taxes thereon so the writer will not include same in this opinion.

CONCLUSION

The answer to your first inquiry is that no credit can be allowed by the county court for a delinquent merchant's license if the county collector failed to obtain a good and sufficient bond as provided by law before issuing a merchant's license. Furthermore, he may be convicted of misdemeanor for failing to secure said bond.

In answering your second inquiry, it is our opinion that the collector must exercise due diligence in collecting such delinquent personal and real estate taxes, for instance, such diligence as to seize and sell any personalty for the payment of said delinquent personal or real taxes; if none are available, then to institute suit against the taxpayer for delinquent personal taxes. Then the collector shall make his affidavit stating that he has exercised due diligence and the result. If no personalty can be found which may be sold for payment of delinquent real estate taxes then the affidavit to this effect should permit the county court to allow credit of such delinquent taxes. However, under Section 11120, supra, they will then be charged back to the county collector for collection under the well established statutory procedure for collection of delinquent real estate taxes.

Respectfully submitted

APPROVED:

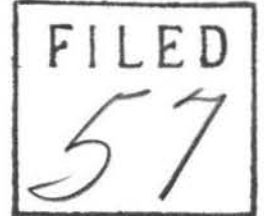
AUBREY R. HAMMETT, JR.
Assistant Attorney General

ROY MCKITTRICK
Attorney General of Missouri

CRIMINAL LAW: Giving a bad check under Section 4694
R. S. Missouri, 1939, without a false
representation is not a violation of
the law.

April 13, 1943

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of April 9, 1943, which reads as follows:

"I am hereby requesting an opinion
on this state of facts:

"The check was as follows:

"Versailles, Mo. March 26, 1943

"BANK OF VERSAILLES

"Pay to the order of Clyde Hayes \$25.00

"Twenty Five and no/100 - -Dollars

"signed A. R. Newell,
"(No Acct.)

"Indorsed on Back of check,
"Clyde Hayes,
"A. F. Gerhart.

"The affidavit for a felony in the
justice court of J. S. Bridges in
the City of Versailles, reads as
follows:

"A. F. Gerhart, being duly sworn
deposes and states that on the 26th
day of March, 1943, at the Township

of Moreau and in said county, A. R. Newell to the best of the affiant's knowledge did then and there with specific criminal intent, unlawfully, wilfully, wrongfully, feloniously did issue and deliver a check for the amount of \$25.00, knowing at the time that he had no funds or account with to pay same. Said check being drawn on the Bank of Versailles Mo. Said check being presented for the payment in due time and payment denied for the reason stated above, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Missouri.

"A. F. Gerhart

"Subscribed and sworn to before me on this 3rd day of April, 1943.

"J. S. Bridges
Justice of the Peace

"This check was presented on the same day it was given, and the notation about no account was made by the vice president and cashier of the Bank of Versailles, and it is admitted that A. R. Newell had no money or credit or account with the bank at the time the check was given or presented and had no money or account or funds there now.

"The affidavit before the justice was made by the justice, and on account of the amount, the statute that is to be complied with in order to make a felony is agreed and admitted to be Section 4694 R. S. Mo. 1939.

"Clyde Hayes the payee of the check owed the indorser, A. F. Gerhart \$15.00, on an old antecedent debt, and A. R. Gerhart paid in cash, to Clyde Hayes at the time of the delivery of the check to A. R. Gerhart.

"The facts are and is admitted, that A. F. Gerhart is an innocent purchaser of the check for value without notice.

"The hidden facts unknown to A. F. Gerhart at the time the check was indorsed and delivered to him, for the 10.00 in cash and the return of an old check that Clyde Hayes had given to A. F. Gerhart for an old debt, of \$15.00, are these:

"A. R. Newell had no money in the bank, but told Clyde Hayes to hold this \$25.00 check, until later; and this \$25.00 check in question was given to Clyde Hayes for second handed set of harness. Clyde Hayes has stolen these harness, and later, these stolen harness was sold to a man in Miller county, and the real owner of these harness recovered these stolen harness.

"All these facts were not known by A. F. Gerhart, and none of these facts were told to A. F. Gerhart by Clyde Hayes.

"A. R. Newell the giver of this check, the maker of this check to Clyde Hayes, claims that he never got anything of value for the check, since the harness was stolen harness, and he never did obtain the harness, and that the check was obtained from him by fraud, and no title passed to the check, and A. F. Gerhart, the innocent party did not get any title to the check, and he cannot prosecute; that he, A. R. Newell never obtained anything of value, and suppose his check was a bogus check under Sec. 4694, there is no crime committed by A. R. Newell, in so far as he and Clyde Hayes are concerned, that two crooks were trying to skin each other, and both are equally guilty.

"Clyde Hayes, the one who stole the harness, and who passed and uttered the check, is in jail for stealing the harness at Warsaw, Mo. The true owner of the harness has his harness back.

"A. R. Newell the maker of the check, sold, these stolen harness to an innocent man, for \$35.00. This man gave a check to A. R. Newell for \$35.00, and when he lost the harness, he stopped payment on the \$35.00 check.

"A. R. Newell, owed a local grocery in Versailles, \$10.00 on a grocery bill, and gave this \$35.00 check on the Miller county man for the sale of the harness; and this local merchant gave credit for the 10.00 debt, and then gave in cash to A. R. Newell, the \$25.00, difference.

"Now, the local merchant is out \$25.00 in cash, because the check he accepted was stopped, and in the long run, Newell received and has in his pocket \$25.00, and he is not worth a judgment for the recovery of the \$25.00 by the local merchant.

"Is this man A. R. Newell liable to a criminal prosecution under Section 4694, for this bogus check, that was delivered to A. F. Gerhart?

"If A. R. Newell is not liable for a criminal prosecution for giving this bogus check, under 4694, then under what statute can he be successfully prosecuted."

Under the above facts, as set out in your request, you are asking an opinion on two questions:

First, is this man, A. R. Newell, liable to a criminal prosecution under Section 4694 R. S. Missouri, 1939, for the giving of this bogus check that was delivered to A. F. Gerhart?

Second, if A. R. Newell is not liable for a criminal prosecution for the giving of this bogus check, under Section 4694, supra, then under what statute can he be successfully prosecuted?

Section 4694 R. S. Missouri, 1939, reads in part as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, * * by means, or by use, of any false or bogus check, * * * shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

Under the facts in your request you state that A. R. Newell and Clyde Hayes were trying to cheat each other and you do not state that either A. R. Newell, or Clyde Hayes made any false representation to the prosecuting witness, A. F. Gerhart.

In order that a successful prosecution could be had, against either one of them, it is necessary for the State to show that false representations were made to the victim and were relied upon by him as true when he paid the Ten Dollars in cash and returned the old check given by Clyde Hayes to the victim, A. F. Gerhart. (State v. Donaldson, 148 S. W. 79, 243 Mo. 460; State v. Robinson, 14 S. W. (2d) 452; State v. Burton, 213 S. W. 424.)

The information must specifically show the details of the act under which the money was obtained by false pretenses. It is not sufficient to say that he fraudu-

lently, or designedly, or by use of fraudulent practices obtained the money, but it must show sufficient facts to inform the defendant under which he is charged. (State v. Martin, 126 S. W. 442; 226 Mo. 538, Ex parte Pelinski, 213 S. W. 809; State v. Wilson, 122 S. W. 701, 223 Mo. 156.) The approved information which is followed in most cases, and sets out all of the elements that must be proven under Section 4694, supra, is set out in the case of State v. Loesch, 180 S. W. 875. The complaint filed in the justice court should as nearly as possible follow the information set out therein.

The mere fact that A. R. Newell gave a check to Clyde Hayes which was drawn on a bank in which he had no funds, which check was cashed by A. F. Gerhart, in itself is not a criminal offense. There must be a confidential relation between the victim and the accused. (State v. Block, 62 S. W. (2d) 428, 333 Mo. 127, and State v. Block, 62 S. W. (2d) 432, 333 Mo. 134.)

Under the facts in your request the accused did not make any false representations to Gerhart, but had all of his dealings with Clyde Hayes. The fact that it was a bad check is not sufficient for prosecution, unless the accused made false representations that caused the victim to pay the Ten Dollars in cash and return the old check to Clyde Hayes.

If there was a conspiracy between Clyde Hayes and A. R. Newell to swindle A. F. Gerhart both could be found guilty of obtaining money under false pretenses. (State v. Starr, 148 S. W. 862, 244 Mo. 161; State ex rel Major, v. Mo. Pac. R. Co., 144 S. W. 1088, 240 Mo. 35.)

According to the facts in your request A. R. Newell and Clyde Hayes were swindling each other and there were not facts set out in your request that show any false representations having been made to A. R. Gerhart.

There is a general statute regarding the obtaining of money under false pretenses (Section 4487 R. S. Mo., 1939) but since Section 4694 R. S. Missouri, 1939, is a specific statute, in that it refers to false checks, it would be applicable if there were sufficient evidence to obtain a conviction. (State v. Richman, 148 S. W. (2d) 796, 1. c. 798.)

Honorable G. Logan Marr

(7)

April 13, 1943.

In the last paragraph of your request you state:

"If A. R. Newell is not liable for a criminal prosecution for giving this bogus check, under 4694, then under what statute can he be successfully prosecuted."

Under the facts in your request Clyde Hayes was to hold the Twenty-five Dollar check in question, and it does not show that any representation was made by A. L. Newell that the check was a good check. On the other hand, it appears that Clyde Hayes knew the check was on a bank in which A. L. Newell had no account.

CONCLUSION

In view of the facts set out in your request it is the opinion of this department that A. R. Newell is not liable to a criminal prosecution under Section 4694 R. S. Missouri, 1939, for the giving of this bogus check that was delivered to A. F. Gerhart by Clyde Hayes.

It is further the opinion of this department that since we are holding that A. R. Newell is not liable on this bogus check under Section 4694, supra, he is not guilty under any statute for the drawing of the check, for the reason that no false representations were made to A. F. Gerhart or to Clyde Hayes, the payee of the check.

APPROVED BY:

Respectfully submitted

W. J. BURKE

Assistant Attorney General

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

CRIMINAL LAW:

When money is not obtained on a "bad check" the drawer is not guilty of obtaining money under false pretenses.

April 28, 1943



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated April 24, 1943, which reads as follows:

"The facts are these: A driver of a commercial truck, was entrusted by the owner and operator of the truck with some money of Mr. W. B. Anderson, consisting of a Montgomery-Ward check, and some cash. The M-W check was made payable to Anderson and the same was indorsed by Anderson. The truck driver, had a wreck, and he used the cash and the check was indorsed, and went through and was paid by M-W. Whether the check was indorsed by the truck driver was not known. Anyhow this check was cashed in St. Louis County. It is conceded that the truck driver would be liable for a criminal prosecution for embezzlement by an agent in St. Louis County, Mo.

"Mr. Anderson prevailed upon the truck owner to make good the loss of Anderson, and the truck owner C. E. Bennett gave a post dated check for the \$65.00 to Anderson, and when the check was due, the check was presented here to the local bank, the bank of C. E. Bennett and on which the bank was drawn. The payment of the check was refused by the bank, and the said Mr. Anderson left the check with the bank for collection. The bank then presented this check in per-

April 28, 1943

son to Mr. C. E. Bennett, and the check was not paid because the said C. E. Bennett did not have any funds in said bank. The banker made a notation on the check, "payment stopped", at the request and order of C. E. Bennett. The check was returned unpaid to the payee Mr. W. B. Anderson.

"Then W. B. Anderson seeks to prosecute C. E. Bennett for a bogus check under sec. 4694 R. S. 1939, because the check was really not paid because there were no funds in the bank.

"This check was given by C. E. Bennett, in order to pay to Anderson the loss Anderson suffered by reason of the embezzlement of the agent of C. E. Bennett. Bennett never received anything of value other than he was trying to make good the theft of the check and money by his agent that belonged to Mr. Anderson. The truck driver, C. E. Bennett, and W. B. Anderson live in Morgan County, and the bank on which the check was drawn is in Morgan County.

"The first question, is this state of facts, with the notation of payment stopped, sufficient to make a crime for a bogus check in order to prosecute under sec. 4694, or any other criminal check statute? And secondly, was this check given in compromise of a felony, because W. B. Anderson tacitly stated, if he got his money the truck driver would not be prosecuted in St. Louis County. Is this check valid, even for a criminal prosecution?"

The facts as stated in your request briefly are as follows:

A Mr. Anderson gave some cash and a Montgomery Ward check which was payable to Anderson, and indorsed by him, to the owner and operator of a truck. It may be presumed that Mr.

April 28, 1943

Anderson gave the owner and operator of the truck the money to purchase something in St. Louis for him. The owner and operator of the truck then gave the money and the indorsed Montgomery Ward check to one of his drivers who, after having a wreck in the city of St. Louis, cashed the check and spent the money and proceeds of the check.

The truck owner and operator made good the loss of the money and the proceeds of the Montgomery Ward check by giving a postdated check for Sixty-five Dollars to Mr. Anderson. This check, when due, and when presented, was refused payment by the bank, for the reason there was not money in the bank to cover it. The bank, however, received the check for collection, and when it was not paid the banker made a notation on the check, "payment stopped" at the request and order of C. E. Bennett, who was the operator and owner of the truck.

Your first question is:

Under the above statement of facts is the owner and operator of the truck guilty of obtaining money under false pretenses as set out in Section 4694 R. S. Missouri, 1939, where the check contained the notation, "payment stopped?"

Section 4694 R. S. Missouri, 1939, reads as follows:

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent

April 28, 1943

to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

The above section specifically states, "obtaining money." Under the facts in your request C. E. Bennett, the owner and operator of the truck at the time he gave the postdated check did not receive any money, for the reason that he had received the money for a purpose at a time previous to the giving of the check. The fact that he gave a postdated check on a bank in which he had no funds, in itself, is not obtaining money under false pretenses. It would be necessary that he made other false representations before a prosecution could be had under Section 4694, supra. It was so held in the case of State v. Richman, 148 S. W. (2d) 796, 1. c. 798, where the court said:

" * * * The Assistant Attorney General who presented the State's case here contended in both printed and oral argument that the check given by defendant was a 'false token' and a 'false writing' within the meaning of Sec. 4095, and that the delivery of the check, without more, constituted a representation that defendant had sufficient money on deposit subject to his check to pay it and that the bank would pay it. Stress is also laid on the word 'designedly' in Sec. 4095 and it is contended, if we understand the State's argument, that by the use of that word the offense denounced by Sec. 4095 is distinguishable from the offense defined in Sec. 4305. So far as that precise point is concerned, we are unable to perceive such distinction. * * * * *."

Also, in order to obtain a conviction under Section 4694, supra, it would be necessary that the information contain the element of obtaining the money from the prosecuting witness. It was so held in the case of State v. Loesch, 180 S. W. (2d) 875, 1. c. 878, where the court said:

" * * * that the pretenses made were false, and defendant's knowledge of their falsity when made (State v. Janson, 80 Mo. 97; State v. Bradley, 68 Mo. 140); that the parties defrauded relied upon and believed in the truth of the pretenses made by the defendant, and were thus induced to and did part with their property (State v. Kelly, 170 Mo. 151, 70 S. W. 477; State v. Hubbard, 170 Mo. 346, 70 S. W. 823; State v. Vorback, 66 Mo. 168; State v. Evers, 49 Mo. 542); * * * * * ."

It is possible that under Section 4695 R. S. Missouri, 1939, the truck owner who owes Anderson could be prosecuted for giving a check on a bank in which he had no funds, even though it was for a past due debt. Section 4695 R. S. Missouri, 1939, reads as follows:

"Any person who, to procure any article or thing of value, or for the payment of any past due debt or other obligation of whatsoever form or nature, or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment."

That he could be prosecuted under Section 4695, supra, was held in the case of State v. Richman, 148 S. W. (2d) 796. The fact that the check was postdated does not relieve him from such a prosecution under the above section for a misdemeanor. It was so held in the case of State v. Taylor, 73 S. W. (2d) 378, par. 5, 95 A. L. R. 476, 335 Mo. 460, where the court said:

"The question has been raised whether a postdated check is within the purview of section 4305, R. S. 1929 (Mo. St. Ann. Sec. 4305, p. 2998), inasmuch as the payee of such a check, in accepting it, relies upon the maker's promise to do something in the future rather than upon an assurance, express or implied, that the check is good when given. To this it may be answered, as in the California case (People v. Bercovitz, supra), that there is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the check is postdated. But a more complete answer is to be found in our own statutes. * * *"

Section 4305 above mentioned is now Section 4695, supra. Under this section it is a misdemeanor and the prosecution would be barred one year after the check was issued.

Your second question was:

Whether the giving of the postdated check to Mr. Anderson by the owner and operator of the truck was a compromise of a felony.

Under the facts set out in your request the truck driver did not embezzle the money and check from Anderson, but embezzled it from the truck owner for the reason there was no confidential relation between Anderson and the truck driver. (State v. Block, 62 S. W. (2d) 428)

April 28, 1943

The fact that Mr. Anderson accepts the money would not prevent prosecution of the case, even if it were true that the truck driver embezzled the money and check from Anderson and not from the truck owner. It was so held in the case of State v. Cooper, 85 Mo. 256, l. c. 261, where the court said:

" * * * This instruction fully and fairly, with the other as to reasonable doubt, presented the case to the jury. The fact that Lawrence got his money back after or at the time of the arrest cannot affect this prosecution."

CONCLUSION

It is, therefore, the opinion of this department that if a person gives a postdated check drawn on a bank in which he has no account, as the payment of a past due debt, and at the time of the giving of the check, or shortly thereafter, did not obtain any money, he cannot be prosecuted under Section 4694 R. S. Missouri, 1939, for obtaining money under false pretenses.

It is further the opinion of this department that if a person gives a postdated check drawn on a bank in which he has no money, for the payment of a past due debt, he can be prosecuted under Section 4695 R. S. Missouri, 1939, even though payment has been stopped on the check, and may be found guilty of a misdemeanor.

It is further the opinion of this department that if a person accepts money which has been obtained from him by false pretenses it would not be compromising a felony for the reason that the acceptance of the money after, or at the time of, the arrest of the defendant cannot affect the prosecution of the defendant.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General

W. J. BURKE
Assistant Attorney General

WJB:RW

SCHOOLS: Sheriff is not authorized to sell lands under
MORTGAGES: school fund mortgages without certified copy of
county court order, made in conformity to Section
10387, R. S. 1939.

May 10, 1943



Hon. Gordon J. Massey
Prosecuting Attorney
Ozark, Missouri

Dear Mr. Massey:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of the procedure to be followed by the County Court, County Clerk and Sheriff in sales of land to fore-close school fund mortgages.

We find two sections of the statute applicable here. Section 10385, R. S. Mo. 1939, provides in part as follows:

"Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty day's notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction fore-closing the mortgage. * * * * *

May 10, 1943

Sec. 10387 provides as follows:

"Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

At first glance it might seem that the sheriff could sell under Section 10385, supra, without the order of court provided for in Section 10387. However, our court in Benton County v. Morgan, 163 Mo. 661, in construing these two sections held that the sheriff could not make the sale without the order of the county court, provided for in Section 10387 and said l. c. 676:

"* * * So that these two section are to be taken together and construed together * * * as required by Sec. 9835. * * *"

Referring to the certified copy of the order marked "B" accompanying your request, we do not think it complies with the provisions of Section 10387, because it does not recite the debt, the interest to be received, or a command to the sheriff to levy on same, with costs.

The portion of the order reading "and that the clerk certify proper orders to the sheriff of Christian County" is without authority and void and does not comply with the requirements of Section 10387. The County Court, under that Section, is to make the order and the clerk is only to certify the order to the sheriff which has the force and effect of a fieri facias on a judgment of foreclosure.

May 10, 1943

In the case of Neil v. Tubb, 241 Mo. 666, the court, in speaking of the duties of the clerk in respect to such sales, said at l. c. 680:

"* * * The clerk's order to the sheriff to sell the property to foreclose the mortgage reciting therein that the county court had theretofore made an order to that effect was an unauthorized act; the only act in that regard that the statute authorized the clerk to perform was to make a certified copy of the order of the court and deliver it to the sheriff. * * *"

The form 27, marked "Order of Sale Under School Fund Mortgage" which accompanied your request is not sufficient because it appears to be an order of the county clerk. This statement is supported by the quotation from the Neil v. Tubb case, supra.

On the question of the time at which the sale should be had, we are enclosing copy of opinion dated March 22, 1938, to L. F. Morris, Prosecuting Attorney, LaFayette County, Mo., covering the question.

In the case of Honaker v. Shough, 55 Mo. 472, the court had before it a case where the officers had not complied with the statute in foreclosing a school loan. The court said at l. c. 475:

"* * * * The order of the County Court to foreclose the mortgage did not truly recite the debt, so as to sufficiently identify the mortgage. But the sheriff proceeded as though the order was sufficient and sold the mortgaged premises to the defendant. If the money raised by this sale was paid to the county, as we must presume it was, it extinguished the debt due to the county, or more properly speaking, it transferred the rights of the county to the defendant. He thereby became in equity entitled to the mortgaged debt.

"If the proceedings to foreclose the mortgage had been regularly made under a proper order, the legal title would have

May 10, 1943

passed to the defendant. As this was not the case, he could only use the forfeited mortgages to protect him in the possession of the mortgaged premises. As he ought to be substituted to the rights of the county by virtue of the payment of its debt, he does not occupy the relation of a stranger to the mortgage, who has no right to set up a forfeited mortgage to prevent a recovery of the possession by the mortgagor or his heirs. This doctrine was maintained by this court in Jackson v. Magruder, (51 Mo., 55,) and afterward reasserted in Jones v. Mack, (53 Mo. 147,) and it may now be considered as the settled law of this State. * * "

We include this statement for cases in which procedure has not been in accordance with the statutes.

CONCLUSION

We are therefore of the opinion that the sheriff can not make a valid sale of lands under a school fund mortgage until he has received a certified copy of the order of the county court, which order shall recite the debt and interest to be received, commanding the sheriff to levy on the lands with costs, which lands shall be described as in the mortgage, which certified copy of the order has the effect of a fieri facias or a judgment in the circuit court, and that upon receipt of said order the sheriff shall proceed to advertise and sell said lands as is prescribed by Section 10385, supra.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:NSH

COUNTY COURT: County school fund loan may be made on any real estate in county. County court without authority to loan money from this fund on land outside county.

May 19, 1943

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Mr. Marr:

This office is in receipt of your letter of recent date, in which your request for an opinion reads as follows:

"The County Court has granted a school fund loan on a farm that lies in Morgan County and an adjoining county. Now they raise the question as to whether this is a proper loan under the statutes relating to school fund loans.

"Ordinarily the statutes say to loan on land within the county.

"If the county court has to foreclose a loan on land in two counties, would the sheriff of Morgan County have the legal right to go over in another county and advertise the school fund mortgage sale in the adjoining county, and be able to get the county a good title for the foreclosure?

"If the county can make such a loan in an adjoining county, it just seems that they could make a loan in another county.

"In looking through the statutes, I cannot find any authority or leeway for making a school fund loan in two counties.

"The county court requests that I get your opinion on the matter, to see if they should go ahead and make this loan under the facts stated."

May 19, 1943

The writer has examined the authorities for the opinions in this State, and as a result of that examination we cite the following statutes and decisions:

At Section 10378 R. S. Missouri, 1939, the county court of each county is given jurisdiction over the county school fund. We do not set out these sections in full, but merely give them for your convenience and information. Also, at Section 10376 R. S. Missouri, 1939, the statute has this to say concerning county school funds:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

The first statute to which your attention is directed is Section 10384 R. S. Missouri, 1939, which concerns itself with the security for loans made by the county court, and we

set out in detail this section, which reads as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts for which he is liable and property exempt from execution. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

Along this same idea, your attention is directed to Section 10386 R. S. Missouri, 1939, which concerns itself with the capital of township funds and how they are to be invested. The matter of additional security and other items are disposed of by this statute, which is merely cited. Also looking at Article XI, Section 10, Missouri Constitution, page 156 c, we find:

"All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto."

With respect to any orders of the court relative to the sale of lands which may be foreclosed, we find in Section 10387 R. S. Missouri, 1939, that the court may make orders and as we have previously found that in doing so it is a court with limited jurisdiction. We conclude that no order involving real estate outside of the jurisdiction of the court can be of any effect.

Sustaining the idea that the county court is one of limited jurisdiction, we ask that you consult the Constitution, Article IV, Section 36, page 121c. Also, we give two decisions which contain the last word as it appears to apply to the question under consideration. St. Louis County v. Menke, 95 S. W. (2d) 818, and Saline County et al v. Thorp, 88 S. W. (2d) 183. This latter decision, by Commissioner Hyde, at page 186, has discussed in detail all of the questions brought up by you and they are adequately disposed of in that opinion.

We further find that the county courts are not general agents of the counties of this State, but courts with limited jurisdiction, and their acts outside of statutory authorization are null and void. Bayless v. Gibbs, 158 S. W. 590, 251 Mo. 492; Sturgeon v. Hampton, 88 Mo. 203; King v. Maries County, 249 S. W. 418; 297 Mo. 488; State ex rel. v. Clinton County Court, 185 S. W. 1149, 193 Mo. 373.

CONCLUSION

From our examination of the statutes and the authorities as they bear on the questions raised, we therefore conclude that a county court has no authority to loan school fund moneys on real estate outside of the county; that the court, as such, is a trustee of school funds and has a very limited jurisdiction in such matters; that any loan made on land outside the jurisdiction of the court would be null and

Honorable G. Logan Marr

(5)

May 19, 1943

void; and further, no order of the court, directed to the sheriff involving matters beyond the jurisdiction and authority of the court would be valid.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED BY:

ROY MCKITTRICK
Attorney General

LIM:RW

CRIMINAL PROCEDURE: On disqualification of a requested judge, the regular judge and not the requested judge shall request another judge.

June 24, 1943



Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
First National Bank Building
Versailles, Missouri

Dear Sir:

We are in receipt of your letter of June 24, 1943, in which you request an opinion from this department, as follows:

"Before Judge Blair of our circuit went to the army, he specially set for June 21, a murder trial, and admonished the defendant to be sure and be ready for trial. The Court order provided that Judge W. M. Dinwiddie of Columbia would be over and take charge of the case on June 21, 1943, the adjourned day of the regular April term 1943. This was by virtue of authority of sec 4040-1939.

"Judge W. M. Dinwiddie had to hold court in his circuit, in Columbia, and could not come here on June 21, the day set. Judge Blair, then arranged, to have Judge Chas. Jackson to come up from the Camden County Circuit. Then when June 21, came, Judge Chas. Jackson, had to hold court in Camden County, and he Chas. Jackson, sent Judge Tom Moore from Ozark, Mo., of the 31st Circuit. Judge Tom Moore, held Court here on June 21, and Court was adjourned to Wednesday June 23, 1943.

"Judge R. A. Bruerer of Gasconade County, was up, today, and he refused to take jur-

isdiction, saying that the only judge to act as a substitute judge, was Judge W. M. Dinwiddie.

"In the murder case, that Judge Tom Moore continued to July 26, 1943. The case was not tried because the defendant turned up in Court without an attorney, and the local attorneys that were appointed by the Court, begged for a continuance on the ground that in a murder case they could not get ready on three hours notice.

"Here is the question that I raising, what kind of legal tangle is the record on, in this business of substitute judges calling in other judges to try the case. I am sure that there will be no stipulation of agreement between the state and the attorneys for the defendant, to have Judge Tom Moore try the case July 26. If the defendant goes to trial and is convicted and is sent to the pen, has he been tried by a judge with jurisdiction and authority to set in the case? In case of the absence of the regular judge, it seems that the statute should be closely followed, and that any conviction that the state should be made to stand up. These two continuance in this state case has been very expensive because the witnesses have been out of Kansas City and St. Louis. What is your opinion about Judge Tom Moore trying the case on July 26, 1943."

Section 4040, R. S. Mo. 1939, reads as follows:

"If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 4037, and no person to try the case will serve when elected as such special judge, the judge of said court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation,

and notify and request another circuit or criminal judge to try the case; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said case; and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said case to the circuit court of another county in the same circuit, or to another circuit or criminal court; and when said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said case in the circuit court of the county to which said case shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said case, the judge of said court shall reset said case for trial to suit the convenience of the judge so requested to try said case, or may notify and request the judge of some other circuit to appear and try said cause as heretofore provided. Should said judge so requested fail to appear and hold the court at the time appointed for the trial of said case, the judge of the court shall order a change of venue in said case to some other circuit. Said order may be made in term time, or by the judge of the court in vacation, by an order in writing, which the judge shall file with the clerk of the court in which such cause is pending. Whenever the judge so requested shall appear and hold the court for the trial of said case, he shall, in addition to the

salary now allotted by law, receive his actual expenses and five dollars per diem for the time necessarily engaged in the trial of said cause, and in going to and returning from the place of trial, which shall be paid out of the state treasury upon the certificate of the clerk of the court in which such cause is pending. Whenever the special judge elected to try a cause shall appear and hold the court for the trial thereof, he shall receive ten dollars per day for the time necessarily engaged in such trial, and five dollars per day while going to and returning from the place of trial if he reside outside of the county where said cause is tried, to be paid out of the state treasury upon the certificate of the clerk of the court where said cause is tried."

The above section was passed upon by the Supreme Court of this state in the case of State v. Gillham, 174 Mo. 671, which reversed the opinion of the Court of Appeals in the same case, reported in 97 Mo. App. 296. In this case the Supreme Court of Missouri, at page 672, said:

"On December 5, 1900, an information was filed against the appellant in the St. Louis Court of Criminal Correction charging him with a criminal offense. Subsequently an amended information was filed. On the said fifth day of December, the date of the filing of the first information, Honorable Willis H. Clark, the regular judge of said court, voluntarily disqualified himself to try the cause against the appellant and called in Judge E. M. Hughes of the Eleventh judicial circuit to try it. As Judge Hughes failed and refused to sit, Judge Clark called in Judge Neville of the

Twenty-third judicial circuit, the appellant objecting and excepting to that order. Afterwards on February 28, 1901, affidavits were filed by the appellant disqualifying Judge Neville; whereupon on the same day that judge made an order calling in Hon. J. W. McElhinney of the Thirteenth judicial circuit to sit in the case, to which order the appellant at the time objected and excepted. The cause was tried before Judge McElhinney, the defendant found guilty and his punishment assessed at \$200, from which judgment he appealed.'

* * * * *

"* * * In the case of State v. Wear, 145 Mo. 162, BURGESS, J., discussing section 4177, Revised Statutes 1889, very similar to this section now under discussion, said: 'The defendant and prosecuting attorney could avail themselves of it or not, just as they saw proper, and as the record does not show to the contrary, the presumption will be indulged that it was their own fault that they did not do so, and that they in fact waived the privilege.'

"With these views, we are clearly of the opinion that Judge Clark had the authority to invite Judge Neville to try said cause.

"This brings us to the last and most vital question in this case. The record in this cause discloses that Judge Neville responded to the request to try this cause; but it further appears that defendant, by application in due form, disqualified him from presiding in the trial of the case. Whereupon, on the same day, Judge Neville made an order calling in Judge McElhinney, judge

of the Thirteenth circuit, to try said cause. To the making of this order, objections and exceptions were duly preserved. It is earnestly urged that Judge Neville had no power or authority to make the order requesting Judge McElhinney to try this case. This is the question that confronts us and it is important, for it is the first time that this precise question has been presented to this court for review.

"Under the law, courts of general jurisdiction have certain inherent powers, but this particular power to request the judge of another circuit to try a case, does not fall within the inherent power vested either in the court or the judge. This authority must depend for its support absolutely upon the provisions of our statute. The authority for the exercise of the power to request the judge of some other circuit to try the cause is contained in section 2597, Revised Statutes 1899, which provides, so far as pertinent to the question involved:

"If, in any case, the judge shall be incompetent to sit for any of the causes mentioned in section 2594, and no person to try the case will serve when elected as such special judge, the judge of said court shall, in either case, set the cause down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request the judge of some other circuit to try the cause; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said cause; and he shall, during the trial of said cause, possess all the powers and perform all the duties of a circuit judge at a regular term of such court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require,

and may grant a change of venue in said cause to the circuit court of another county in the same circuit, or to another circuit; and whenever said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said cause in the circuit court of the county to which said cause shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said cause, the judge of said court shall reset said cause for trial, to suit the convenience of the judge so requested to try said cause, or may notify and request the judge of some other circuit to appear and try said cause, as heretofore provided.

"It will be observed that this section confers this power upon the judge of the circuit, or the judge of the particular court, of which he is judge, and not upon the court, and the very terms of this section indicate clearly that this power is vested in the regular judge of the circuit or of the court, and not in the judge who may temporarily be exercising powers of the regular judge, in some particular case. The language of that section is, 'notify and request the judge of some other circuit to try the cause.'

"This statute clearly intended, to the end that judges of circuits or of courts might dispose of the cases pending before them, to confer the power upon the judges of these courts, to request a judge of another circuit to try such causes as are contemplated by law.

"The rule as to where the power to request the judge of another circuit is vested, is

clearly and forcibly announced in the case of State v. Newsum, 129 Mo. 154. BURGESS, J., speaking for the court, says:

"The statute does not require that the request by the judge of one circuit of the judge of another circuit court to hold a term of court, or part thereof, or to try any particular criminal case, shall be by an order of record, but it expressly provides that the judge may make such request, which evidently means that he may do so in his capacity as judge, and not necessarily while he is sitting as a court."

"Judge Neville certainly could not have set the case down for hearing, adjourned the court, returned to his home, and made the request of Judge McElhinney to try said cause. If he could not do this, he is equally wanting in power to make the order in court."

"The authority to make the request of a judge of some other circuit to try the case is vested in the judge and he can make this request in chambers as judge, and even in vacation of his court."

"It is of common occurrence and in perfect accord with the statute, where the regular judge is disqualified, to set the case down for some particular time, adjourn court, return home in another county, not even intimating in court as to whom he will ask to try it, then by letter request the judge of another circuit to appear at a certain time to try the case, and the judge requested appears and presents his letter of request as authority for trying the case."

"We are clearly of the opinion that the authority to request a judge of some other

circuit to try a case, as contemplated by section 2597, supra, is vested alone in the regular judge of the circuit or of the court over which he presides, and that section gives no power or authority to a judge of another circuit requested to try a particular case, to exercise such right."

Section 2597, R. S. No. 1399, mentioned in the above quotation, is now Section 4040, R. S. No. 1939.

Also, the Supreme Court, in the case of State v. Malone, 333 No. 594, 1. c. 509, 62 S. W. (2d) 909, said:

"I. Honorable Frank Kelly, the regular judge, had been disqualified and had called another circuit judge, Honorable E. H. Dearing, to try the case. Judge Dearing presided at the first trial, but after the case was remanded he disqualified himself and declined to preside further, whereupon Judge Kelly called Honorable Will H. D. Green, judge of the Twentieth Judicial District, to try the case. Judge Green accepted the call and presided at the second trial. In his brief appellant challenges the authority of Judge Kelly to call another judge upon the refusal of Judge Dearing to preside further in the case but in oral argument here his counsel withdrew that complaint, so it need not be noticed further than to say that when Judge Dearing declined to act Judge Kelly, the regular judge, not Judge Dearing, had the right and it was his duty to provide another judge. (State v. Gillham, 174 No. 671, 74 S. W. 859; State v. Hudspeth, 159 No. 178, 60 S. W. 136.)"

Also, in the case of State v. Huett, 340 No. 934, 1. c. 943, 104 S. W. (2d) 252, the court said:

"* * * Section 3651, Revised Statutes 1929 (Mo. Stat. Ann., p. 3206), provides that when the judge is incompetent to sit for any of the causes mentioned in Section 3648, supra, and no person to try the case will serve when elected as such special judge, the judge of said court--not the court--(see State v. Gillham, 174 Mo. 671, 74 S. W. 359) shall set the case down for trial and notify and request another circuit or criminal judge to try the case, whose duty it is to appear and hold the court for the trial of the case."

Section 3651, R. S. Mo. 1929, mentioned in the above quotation, is now Section 4040, R. S. Mo. 1939.

Also, in the case of State v. Perkins, 339 Mo. 27, 1. c. 33, 95 S. W. (2d) 75, the court said:

"So we say in the case at bar. When Judge McAnnally became disqualified after he had been called and entered upon the discharge of his duties, the case then stood in the Circuit Court of Shannon County, as though Judge McAnnally had never been called, or had refused to accept when he was called. The right to a change of venue or a change from the judge being a mere statutory privilege which a defendant may waive, it must undoubtedly be true that after the application for a change was filed, and before the regular judge acted upon it by calling Judge McAnnally, it could have been withdrawn. If Judge McAnnally's disqualification or refusal to act after he was called, placed the case back in the position it was before he was called, with authority in the regular judge to call in another judge, it must follow that the application could be withdrawn before another judge was called and assumed charge."

In your request you state that Judge Blair, of your circuit, first appointed Judge W. M. Dinwiddie, who could not be there on the date set for the trial, and that Judge Blair then arranged to have Judge Charles Jackson to come up from the Camden County Circuit. We are assuming that this arrangement was a request from Judge Blair to Judge Charles Jackson. If such is the case, it appears that the only person who can now try the cause is Judge Charles Jackson and not Judge Tom Moore.

CONCLUSION

It is, therefore, the opinion of this department that the authority to request a judge of some other circuit to try a case, as contemplated by Section 4040, R. S. No. 1939, is vested alone in the regular judge of the circuit court, or the court over which he presides, and that section gives no power or authority to a judge of another circuit requested to try a particular case to exercise such right.

It is, therefore, the opinion of this department that Judge Tom Moore, who has been requested by Judge Charles Jackson of Camden County Circuit to try the cause mentioned in your request, does not have jurisdiction over the cause.

It is further the opinion of this department that if Judge Charles Jackson was requested to appear and try the cause mentioned in your request, after Judge W. M. Dinwiddie did not appear on the date set for the trial, then the proper judge to try the cause is Judge Charles Jackson.

It is further the opinion of this department that, in assuming that Judge Sam Blair disqualified himself by reason of his absence in the United States Army, the last and final judge that he requested, that is, Judge Charles Jackson, should be the proper judge to sit in this particular case.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

WJB:CP

INSANE PATIENT:

County court may require estate of indigent insane patient to pay hospital fees, when by reason of an inheritance, the court changes status of patient from "county" to "private pay" patient.

July 14, 1943

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Mr. Marr:

This will acknowledge receipt of your letter of recent date, in which you request an opinion concerning recovery by the county court from funds in the hands of a guardian of an insane county patient.

The details of your request, as set out in your letter, are as follows:

"When Fred Adams was sent to Nevada, Mo., to the state hospital for the insane, as a county patient, he had no estate. After he had been there a while, he inherited some money from the estate of his grandfather, and for that estate a guardian was appointed for him, and that estate is still pending. For nearly eight years he has been in the state hospital for the insane as a county patient; and he has an estate here in the probate court, and it is slowly being consumed by court costs and some expenses of the guardian in making settlements, annually.

"After reading section 500 of the R. S. Mo. 1939, it seems to me that section was just made for that situation, but after reading the case of Audrain County v. Muir, 249 S. W., 1. c. 385, it looks like those cases cited would hold that unless

July 14, 1943

there is some special contract with the county, before a man is sent away, the county cannot recover; but I do notice that the statute cited in Chariton County vs. Hartman, 190 Mo. l.e. 76, 77-88 S. W. 617, is different in wording than section 500 supra.

"I want to know if section 500, will support an action by Morgan County against this estate of Fred Adams for the moneys we have been out for his keep in the state hospital for the last eight years?"

Before discussing the questions raised in your letter it will be necessary to make certain assumptions in connection with the facts as you state them. We assume, therefore, in this instance the following:

1. Adams was, and is "a person without a family", as classified under our statutes;
2. The estate, or property, in the hands of the guardian is still in the form of personal property (money inherited from grandfather's estate);
3. That the guardian has refused a demand against the estate on the part of the county for funds in his hands for the upkeep of his ward while the ward is in the State Hospital.

With respect to the indigent insane, and particularly with the situation you mentioned, your attention is directed to Section 9358 R. S. Mo., 1939, which defines and construes terms hereinafter used, as follows:

"The words 'insane' and 'lunatic,' as used in this chapter, shall be con-

strued as including every species of insanity or mental derangement. The terms 'insane poor' or 'indigent insane,' when applied to a person without a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by any person other than the head of a family; and the same words, when applied to a person having a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by the head of a family; * * * "

See Section 504 R. S. Mo., 1939, for it defines a "person of unsound mind" and "insane person" to mean either an idiot, lunatic or a person of unsound mind and incapable of managing his own affairs.

See also Sections 9590, 9591, 9593, and 9594 R. S. Mo., 1939. We do not quote these sections because of their length, but they concern themselves with the county's support of the poor. The leading decisions as they apply are Yarnell v. Cole County, 80 Mo., 1. c. 84, and Scotland County v. McKee, 67 S. W. 559, 168 Mo. 282.

Section 501 R. S. Mo., 1939, relating to expenses, reads as follows:

"If any insane person be admitted into the state lunatic asylum as a patient, the guardian shall pay for his

support and expenses at such asylum, out of the estate of such ward; and if such insane person shall, at any time, come under the class of 'insane poor persons,' as specified in the law for the government of the state lunatic asylum and care of the insane, such person shall be supported and maintained at such asylum by the county in the manner provided by such law."

Section 500 R. S. Mo., 1939, provides that appropriations may be recovered:

"In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and also the county may recover the amount of said appropriations from the estate of such insane person."

Under the decisions in cases arising under Section 500, supra, it seems that before the county can recover for sums expended in support of the indigent insane where the court has committed a patient upon a declaration of inability to pay for this support it, the court, must bring itself under the statutory provisions and show that the guardian was bound to provide for the ward's support and had apparently sufficient ability to pay.

When committed to the State Hospital at Nevada, Adams was declared to be an indigent insane person, and as such

a county patient to be supported by the county. As we have previously seen, under the decisions, the county, in order to recover from the guardian, must show that the guardian is bound to provide for the ward's support and has apparent ability to pay.

Does the fact that the patient receives an inheritance some time subsequent to his commitment change his status with respect to the payment of funds toward his "keep" while in the hospital? We believe it does. He is not now "indigent" within the meaning of the statute, in the sense that he lacks income, or funds. He is "indigent" only by reason of physical infirmity or disability.

Looking now to an authority on "guardianship", we find in Woerner's American Law of Guardianship, at page 468, the following:

"But while an adult person of unsound mind cannot be held liable for any express contract entered into by him, it is clear on principle and authority that such person may become liable on an implied contract for necessities suitable to his estate and condition in life, furnished before or after the appointment. The ancient maxim, that no one ought to be permitted to stultify himself, though denied in modern law, is clearly applicable in cases of lunatics, where the law implies, as it does in cases of minors, a promise to pay for necessary services, or supplying necessary articles, if not supplied by the guardian. Insane persons stand, in this respect, on the same footing with minors. The services rendered, or articles furnished,

must be such as to prove beneficial to the lunatic; if they prove of no benefit, the party cannot recover, even though he in good faith supposed him to be sane, if the circumstances known to the other were such as to convince a reasonable and prudent man of his insanity, or put him on an inquiry by which, if reasonably prudent, he might have learned that fact. * * * * *

Turning now to the latest decision on the question involved, we find in *Barry County v. Glass*, 160 S. W. 2d 808, 809, 810, the following:

"Section 471, R. S. 1939, provides that all demands against the estate of an insane person shall be presented to the probate court. Notice of such demand concededly was served upon the guardian and curator. The Probate Judge allowed the demand to Barry County as a fifth-class claim, which means that such demand was presented within six months after notice of the guardianship was published. The Statute says 'all demands' against the estate. The probate court certainly had original jurisdiction to allow and classify the claim of the county against the estate of any insane person, regardless of whether or not such estate was sufficient to pay such demand.

"Plaintiff in error cites *Montgomery County v. Gupton*, 139 Mo. 303, 39 S. W. 447. All we need to say of the case cited is that it was decided in

July 14, 1943

1897 and before the Statute was amended so as to give the county a demand or claim against the estate of the insane person. What the Supreme Court held in that case, is well shown in paragraphs 1 and 2 of the syllabi of the 39 S. W. at page 447. The 1927 amendment, Laws 1927, p. 98, R. S. 1939, Sec. 500, supplied the very defect pointed out in the Gupton case. The judgment must therefore, be affirmed."

CONCLUSION

From the examination of authorities touching upon the question involved and the facts as you give them, we conclude as follows: the county court may require the estate to pay for the upkeep of an insane indigent patient previously admitted to a state institution as a county patient and supported by the county.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

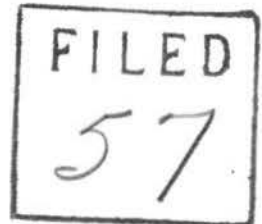
ROY McKITTRICK
Attorney-General

LIM:FS

SOLDIERS: Right of Civil Authorities to try soldier
CRIMINAL LAW: for Civil offense in time of war.

August 3, 1943

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 28, 1943. Restating your request for the sake of brevity, you inquire if a person now a member of the armed forces in this country, home on a furlough and indicted for murder may be apprehended while on his furlough for the crime committed by him, as shown by the indictment, prior to his induction into the armed forces? Also, does the fact that he enlisted, pending the return of the indictment, grant him any immunity?

Under date of August 18, 1941, this department rendered an opinion to Honorable James L. Paul, Prosecuting Attorney of McDonald County, holding that civil courts have jurisdiction concurrent with military courts to try for violations of civil laws. However, this opinion deals only with conditions during times of peace since, at that time, there had been no declaration of war by Congress.

It is conceded that military courts are created primarily for punishment of military offenses. However, the decisions hold that this does not give the exclusive jurisdiction to such courts but that they often have concurrent jurisdiction for civil offenses. As a rule, for civil offenses, the decisions generally hold that whichever court, the military or civil, that first takes jurisdiction for the offense, will not be disturbed by the other court for the same offense.

In *Caldwell v. Parker*, 40 S. Ct. 388, 252 U. S. 376, 64 L. Ed. 621, the Court, in a very comprehensive opinion, held that under Section 1546, Article 74 of the Articles of

August 3, 1943.

War, it did not give the military authorities exclusive jurisdiction in time of war of offenses committed in violation of State laws, by persons in the military service, but that the State Courts also have jurisdiction. In so holding the Court said:

"It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit, and that the court was right in so deciding and hence its judgment must be and it is affirmed."

In *Ex parte Koester*, 206 Pac. 116, 56 Calif. App. 621, the Court held that notwithstanding Article 74 of the Articles of War, requiring a soldier to be delivered to civil authorities for trial for an alleged crime, except in time of war, the jurisdiction of military courts over a soldier is not exclusive of the civil court even during time of war, if the soldier was stationed within one of the states where the civil courts were functioning and where no actual hostilities were in progress. In the Articles of War contained in Chapter 36, Title 10, U.S.C.A. are numerous acts which come under civil offenses and are not specifically regulated are covered by two very broad provisions, namely Sections 1567 and 1568. Section 1567 (article 95) reads:

"Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

Section 1568 (article 96) reads as follows:

"Though not mentioned in those articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of

by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It was held in *Carter v. Roberts*, 20 S. Ct. 713, 177 U. S. 496, 44 L. Ed. 861, that where an offense is specifically provided for in any Articles of War prior to Article 96, the grant of jurisdiction to a court-martial to try and punish such offense is conferred by the particular Article which mentions it and not by Article 96 providing for trial and punishment of all offenses, not capital, and all disorders though not mentioned in previous Articles. All offenses not capital or otherwise provided for under Section 1568, supra, Article 96, come under the jurisdiction of the military authorities.

Another provision contained in the Articles of War, hereinabove referred to, clearly indicates that civil courts have a right to punish soldiers for civil offenses. Section 1546 reads:

"When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall

be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence."

Section 1564 of the same Articles provides that such persons who commit rape or murder are subject to death or imprisonment for life as a court-martial may direct, but that such crimes committed in times of peace, within the State, shall not be tried by court-martial. Section 1564 provides:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

However, the Courts have held that under such a provision and also Section 1546, supra, that the military courts do not have exclusive jurisdiction over such crimes in time of war. In U. S. v. Hirsch (D.C.) 254 Fed. 109, 110, it was said that:

"* * * Under this law both courts-martial and civil courts necessarily respected the jurisdiction which was being exercised by the other, and the court first apprehending the defendant was thus able to proceed with a trial, without reference to the concurrent jurisdiction of the other. In the same way double jeopardy was avoided. * * * * *"

In *McKittrick v. Brown*, 85 S. W. (2d) 385, 1. c. 390 and 391, the Court, in reviewing decisions of the Supreme Court of the United States on the phrase "except in time of war", contained in certain provisions in the Articles of War, held that the decisions indicate that such Articles confer upon the States a prior jurisdiction to try such persons for criminal offenses cognizable by them, except in areas affected by military operations or where military law has been declared or where civil authority is totally suspended or obstructed. In so holding the Court said:

"It would seem that the instant case comes squarely within the first exception in the above article. The prisoner is a person subject to military law; he is held by the military authorities to answer for a crime punishable under the articles of war; he is awaiting trial. We cannot find that this particular part of the article has ever been judicially construed. But in *Caldwell v. Parker*, supra, the Supreme Court of the United States reviewed the history of the articles of war and declared the meaning and effect of the other exception 'except in time of war' appearing in article 74. The opinion (252 U. S. 376, loc. cit. 387, 40 S. Ct. 388, loc. cit. 391, 64 L. Ed. 621, loc. cit. 625) expresses grave doubt 'whether it was the purpose of Congress, by the words "except in time of war" * * * to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified -- a doubt which, if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts (in the case under adjudication), but the entire absence of jurisdiction in the military tribunals.' In other words, the opinion indicates a view that the spirit and purpose of the articles of war was to confer upon the state courts a prior or paramount jurisdiction to try

August 3, 1943.

persons in the military service for criminal offenses cognizable by them, except in areas affected by military operations, or where martial law had been declared, or where civil authority is totally suspended or obstructed. And if this be true in time or war, all the more should it be true where the only reason supporting the military authorities in retaining jurisdiction against the state courts is that they had first asserted it."

Just recently, in United States et al. v. Matthews, Vol. 49 Fed. Supp., page 203, l. c. 205-206, a United States District Court handed down a decision which holds that the existence of war does not give military courts exclusive jurisdiction over proceedings against a soldier who had been arrested and held in custody by State officers on a charge of rape, and that State officers could not be deprived of their custody by habeas corpus. Of course, in that case the military authorities had not instituted any proceedings against the soldier for the same crime or intimated that they intended to do so, or that by the civil authorities assuming custody of said soldier did it in any manner interfere with the prosecution of the crime. Had the military authorities exercised any such authority, then, no doubt, the military authorities would have precedence over the State. In so holding the Court said:

"In the argument on behalf of the petitioners it is urged that in Article 74 of the Articles of War, as set out in Section 1546 of 10 U.S.C.A., priority is bestowed on the Military Authorities to have custody of all persons in the military service in time of war regardless of any crimes such persons may commit while engaged in such military service against the peace and dignity of the State. Much emphasis is placed on the words in this section 'except in time of war.'

"This section and its history shows unmistakably to this court that the section was designated only to modify what had theretofore been the absolute and unqualified duty of the military authorities to surrender over to the State authorities on demand, in

August 3, 1943.

time of peace and war, persons in the military service who were charged with certain offenses against the laws of the State. This language, 'except in time of war,' only relieved the military authorities of what had theretofore been its duty, upon proper application by the State, to use its utmost endeavor to deliver over such accused person to the civil authorities.

"It is not contended on behalf of the petitioners that the military courts have the exclusive jurisdiction to bring a soldier to trial for the crime of rape. It is conceded that the State has jurisdiction to try him, but it is contended that by reason of the language in the statute 'except in time of war,' the jurisdiction of the State must be suspended or vacated on the demand of the military authorities for the custody of the soldier.

* * * * *

"It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit and that the court was right in so deciding and hence its judgment must be and it is affirmed."

CONCLUSION

Therefore, it is the opinion of this department that a soldier on furlough, during a period while this country is at war, who has been charged with committing such an offense against the State, may be taken into custody if the military authorities have not charged him with the same offense. There may be some extenuating circumstances wherein the military authorities may be entitled to the custody of such sol-

Hon. G. Logan Marr

-8-

August 3, 1943.

dier.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

ARH:jn

CIRCUIT CLERK: A person over the age of seventeen
RECORDER OF DEEDS: years may act as deputy circuit clerk.
DEPUTIES:

August 25, 1943



Mr. Wilburn Marshall
Circuit Clerk and Ex-officio
Recorder of Deeds
Ray County
Richmond, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of August 20th, 1943, in which you request the opinion of this department. Your letter is as follows:

"Am asking for information, regarding a deputy I have, who is nineteen years of age.

"Some one has brought up the question as to the legality of her signing instruments for me, which are brought in for recording.

"Would appreciate your opinion of this matter, * * * * *

From your letter it appears that you desire to know whether or not the acts of your deputy, who is nineteen years of age, are legal and binding. We understand that your deputy has been duly appointed by you, as such deputy, and that the appointment has been approved by the court or by the judge in vacation.

Ray County, by the last decennial census, has a population of 18,584, and, under Section 13147, R. S. Mo. 1939, as amended by the Laws of Missouri 1941, at page 525, there is created an office of recorder in each county in the state

containing 19,000 inhabitants or more, which office shall be styled "the office of the recorder of deeds." It is provided by Section 13149, R. S. Mo. 1939, as amended by the Laws of Missouri 1941, at page 525, as follows:

"The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 19,000 inhabitants or more."

Therefore, your office falls under that classification and is designated as "circuit clerk and ex officio recorder of deeds."

Under Article 1, Chapter 92, R. S. Mo. 1939, the article pertaining to clerks of courts of record, we find Section 13299, which provides as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Under this section you are authorized and empowered to appoint as your deputy a person at least seventeen years of age who has all of the other qualifications which are necessary for you to have as circuit clerk.

CONCLUSION

It is, therefore, our opinion that the acts of your deputy, who is nineteen years of age and who possesses all of

Mr. Wilburn Marshall

-3-

August 25, 1943

the other qualifications which you, as circuit clerk, possess, and whose appointment has been approved by the judge or by the court of the circuit in which Ray County is now situate, are valid and binding in all respects.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

CRH:CP

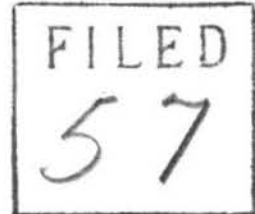
APPROVED:

ROY MCKITTRICK
Attorney-General

See 13434-1939

PROSECUTING ATTORNEYS: Should not accept employment to
appear for clients before County Court.

October 4, 1943



Hon. Gordon J. Massey
Prosecuting Attorney
Ozark, Missouri

Dear Mr. Massey:

Under date of September 29, 1943, you wrote this
office requesting an opinion as follows:

"Please advise me whether or not the
prosecuting attorney of a county can
represent petitioners in the proceed-
ings of establishing a new road.

"I take the position that since the
prosecuting attorney represents the
county court he cannot represent the
petitioners."

It would seem that the position you take is the
correct one.

The procedure for the establishment of roads is
found in Article 1, Section 46, R.S. Mo. 1939. The
first sentence of Section 8473 is as follows:

"Applications for the establishment of
all public roads, except state roads,
shall be made by petition to the county
court.* * *"

The prosecuting attorney is the legal advisor of
the county court. Section 12944, R. S. Mo. 1939, as
follows:

"He shall prosecute or defend, as the case
may require, all civil suits in which the
county is interested, represent generally

the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties." (Underscorings ours)

As the legal advisor of the county court if called upon by the court or any member thereof, it would be his duty to advise the court on matters of law in connection with the filing and determining of a petition to open a road.

In Sharswood on legal ethics the following brief quotation is taken from page 83:

"Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question."

It is impossible to see how a prosecuting attorney could act as the legal advisor of the county court and fairly and impartially advise the court upon the law on one hand, and on the other hand represent petitioners

October 4, 1943

before the court, and try to lay before the court only such things as would be favorable to the side of the petitioners.

Conclusion

It is our conclusion that a prosecuting attorney should not accept employment to represent petitioners before the county court who are petitioning the opening or establishment of a public road as this would place the prosecuting attorney in the position of attempting to represent two different parties in the same transaction where there might be a diversity of interest.

Respectfully submitted

W. O. Jackson
Assistant Attorney-General

APPROVED:

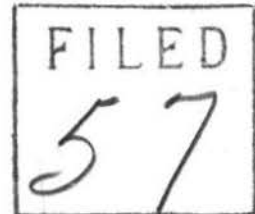
ROY MCKITTRICK
Attorney-General

WOJ:lr

PROBATE JUDGES :
SALARY :
COUNTY BUDGET :

Probate Judge's Salary may be paid
out of current Budget if there is a
surplus, otherwise out of the 1944
revenue.

October 7, 1943



Smith

Honorable Joseph V. Massey
Judge of the Probate Court
Van Buren, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you inquire as to the payment of the salary of Probate Judges under Senate Bill #4, of the 62nd General Assembly, and especially the duty of the County Court in reference to such payment under the County Budget Act.

In your request you state that there has been no provision for the payment of this salary under the current Budget.

The Act goes into effect on November 22, 1943, so the salary from November 22, to December 31, 1943, is included.

Section 13404a of said Senate Bill # 4, provides for the payment of the annual salary of the Probate Judge in equal monthly instalments and requires the fees of the office to be turned into the County Treasury at the end of the month in which they are collected.

The question here is similar to the question which was before the Supreme Court in the case of Gill v. Buchanan County, 346 Mo. 599. In that case the salary involved was that of a Judge of the County Court. The action for the back salary claimed due was brought long after the year in which the obligation for the salary accrued.

The court held under the facts in that case that the provisions of the constitution, Sec. 12, Art. 10, would not be violated in paying this back salary. At l. c. 605, the court said:

"*** However, our conclusion is that a county's liability for a county officer's salary is incurred not just when each monthly installment thereof is payable, but, insofar as the constitutional provision herein invoked is concerned, the whole amount, due and payable during each year, must be con-

Oct. 7, 1943

sidered from the beginning of the year. This must be true because the annual amount of such salary is fixed by the Legislature and no other officer or officers have authority to change it, either before or after it is due and payable. (Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857; State ex rel, Rothrum v. Darby, 345 Mo. 1002, 137 S. W. (2d) 532.) Certainly such annual obligations imposed upon the county by the Legislature would be valid from the first of the year, if within the limits of the constitutional provisions fixing the county's authority to raise revenue during each year to pay them; and no part of any such obligation could become invalid merely because the county court decided to incur other obligations for different purposes during the year.***"

Then the Court in referring to the Budget Act as it applied to the question there said:

"***Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries, to pay salaries of \$4500.00 each. (Only \$840 more than the total of salaries figured at \$3000.00 each was included in the salary fund for the county court.) However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the County Court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget law but must be read and considered with it in construing it. They amount to a mandate to the county court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such sal-

Oct. 7, 1943

aries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was "to compel county courts to comply with the constitutional provision, Section 12, Article 10" by providing "ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income." (Traub v. Buchanan County, 341 Mo. 727, 108 S. W. (2d) 340.) To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officer's salaries fixed by the Legislature, does not affect the county's obligation to pay them.***"

By the same reasoning the County Court would be authorized to pay this salary out of next year's budget if there is not a sufficient balance in classes 4, 5, or 6 of the Budget.

Hon. J. V. Massey

-4-

Oct. 7, 1943

This salary item could be classed as an emergency item and be paid under Class 5 of the Budget Act if funds are available in that class. If funds are not available in any class, then as stated under the Buchanan County case, supra, this salary could be set up and paid out under the 1944 Budget.

C O N C L U S I O N

From the foregoing it is the opinion of this department that the claim for the probate judge's salary is a valid and enforceable demand; that if there is a surplus in the anticipated revenue for the year 1943, over and above all necessary charges, a warrant for such unpaid salary may be issued payable out of Class 4, 5 or 6, if such surplus exists in either of such classes, or unclaimed balances in Classes 1, 2, 3, and 4, may be transferred to Class 5 to pay same.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

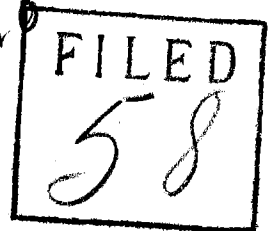
ROY MCKITTRICK
Attorney General

TWB:LeC

PROBATE JUDGES: Probate Judges' compensation limited to
LIMITATION ON annual compensation of Circuit Judge for
COMPENSATION : same county for judicial services.

January 16, 1943

Hon. W. C. McDonald
Judge of the Probate Court
Warrensburg, Missouri



Honorable Sir:

We acknowledge receipt of your letter of January 8th, last, requesting an opinion as follows:

"May I ask an opinion of you? Under the law the Probate judge may retain fees in an amount equal to compensation of Circuit Judge from all sources for each particular year Sec 13404-----less \$1200.00 expenses.

"Judge of this District from all sources in the aggregate \$6000.00--less the \$1200.00--leaving \$4800.00 which we figure the probate judge is entitled too.

"We feel we are right in our construction of the law but would like to have your opinion or O K in the matter."

Section 13398 of R. S. Mo., 1939 contains general provision for the collection and levy of fees in connection with the operation of fee offices.

The fees of probate judges are established by Section 13404 of R. S. Mo., 1939, and this section, after setting out in detail the specific fees for different services and acts, provides further:

" * * * * that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of

the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund. * *

* * * * *

The probate judge must rely entirely upon statutory authority for the collection of his fees, and has no common law rights thereto.

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182 * * * *

" * * * * *

"After some litigation and resulting amendment of the statute it is now established that the annual compensation of a circuit judge received 'from all sources and for all duties by virtue of (his) office,' which is made the basis of the amount of fees to be retained by a probate judge includes such compensation as a circuit judge may receive as a jury commissioner. State ex rel. and to Use of Jasper County v. Gass, 317 Mo. 744, 296 S. W. 431. Consequently the stipulation of the parties is proper as it conforms with this ruling. There can be no dispute that in addition a probate judge is entitled to ten per cent of the excess funds collected under the plain wording of the statute."

Smith, Judge v. Pettis County, 136 S. W. (2d) 282.

It must be borne in mind, however, that the amount retained by the judge for any one year must have been collected during that year.

" * * * * The limitation is only on the fees collected and not on the fees earned during the year. For example, if the amounts collected for the first and second years of the term each were less than the limit and then the amount collected for the third year was in excess of the limit, the excess could not be applied to extinguish the deficits of the two previous years. Under the plain and unambiguous meaning of the proviso such excess must be paid to the county and this is so even though the excess was created by fees earned during the previous years of the term. The condition 'irrespective of the date of accrual' as applied to the annual collections determines this. There is no basis for the contention that an average yearly amount equal to the salary of a circuit judge should be maintained. The amount collected in one year has no bearing on amounts collected in other years.

* * *"

Smith, Judge v. Pettis County, supra.

The court, in the above case, held that fees for solemnizing marriages are not fees assessed for judicial services and, therefore, do not come within the limitations imposed by statute and do not have to be accounted for as other fees.

" * * * * There is included under Section 11782, which specifies the fees of probate judges, an item: 'For solemnizing a marriage \$2.00.' But this must be considered with Section 11776, which allows fees for services rendered in discharging the duties imposed by law and requires the clerk of the court to keep account of fees accruing in matters 'pending in their said courts.' This is the only item in the entire list which does not pertain to a judicial matter. It is our opinion that the duty imposed by this section to account for fees means the fees assessed for judicial services. Our decision in *City of St. Louis v. Sommers*, 148 Mo. 398, 50 S. W. 102, involving such similar facts and statutes is peculiarly apposite here. * * * "

Smith, judge v. Pettis County, supra.

Allowances to a circuit judge for expenses may not be considered in determining the amount of his compensation, for the purpose of determining the amount of fees to be retained by a probate judge as his compensation.

"The trial court, in determining how much compensation the circuit judges received, added to the \$2,000 paid by the state the \$1,200 allowed for expenses, making a total of \$3,200, which, deducted from the \$4,500 referred to in section 6640, fixed the compensation of the jury commissioner at \$1,300. The exception of the \$1,200 allowed for expenses in the amendment to section 10991, R. S. 1919 (Laws of 1921, p. 599), does not apply to the probate judge of Jasper County, for it is an allowance to the circuit judges for expenses when holding court in counties other than in the county in which the judge

January 16, 1943

resides. The circuit judges of said county do not hold court in other counties. However, the \$1,200 allowed for expenses is not an allowance for services of any kind."

State ex rel. and to Use of Jasper
County v. Gass et al., 296 S. W. 431,
432.

CONCLUSION

It is our opinion that probate judges of the state may retain as compensation for their services, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year, by or for any one probate judge, and irrespective of the date of accrual of such fees, an amount equal to the annual compensation provided by law for judge of the circuit court having jurisdiction in such county, except allowances to said circuit judge for expenses, and in addition thereto, the probate judge may retain all fees lawfully collected by him for solemnizing marriages, assuming, of course, that there is an excess of fees collected.

We have not attempted to determine the compensation received by the judge of the circuit court having jurisdiction in your county, because such compensation varies according to the population of the different counties.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LAP:wb

GENERAL ASSEMBLY: Mileage of members attending session.

June 2, 1943

Representative W. N. McDonald
and
Representative R. H. Ridenhour
House of Representatives
Jefferson City, Missouri



Gentlemen:

Today you have requested the opinion of the Attorney-General upon the following:

"Your opinion is respectfully requested as to the proper amount of mileage each member of the General Assembly should receive for attending the present session.

"We understand that the State Auditor ascertained from the State Highway Commission the number of miles by the State Highways to the county seat of each member's county, and has adopted that figure for the purpose of computing mileage."

At the General Election held on November 3rd, 1942, the voters of our state adopted a new section 16 to Article IV of the Constitution and repealed old section 16 and sections 21 and 22 of such article. The new section 16 is as follows:

"The members of the General Assembly shall severally receive from the State Treasury for their services a monthly salary of one hundred and twenty five dollars per month commencing as of January 1st next following the adoption of this Section, and upon certification by

the President and Secretary of the Senate, and by the speaker and chief clerk of the House of Representatives, as to the respective members thereof, the State Auditor is hereby directed and empowered to audit and the State Treasurer to pay such compensation without legislative enactment. The members of either house shall also receive the sum of one dollar (\$1.00) for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route."

(Underscoring added.)

The above amendment became effective January 1st, 1943, and the underlined portion determines the rate and amount of mileage of legislators. This provision is self-enforcing (State ex rel. McKittrick v. Wymore, 119 S. W. (2d) 941, 343 Mo. 98), and all prior statutory and Constitutional provisions on the question are invalidated thereby. State ex rel. McKittrick v. Bode, 113 S. W. (2d) 805, 342 Mo. 162; State ex rel. Dengel v. Hartmann, 96 S. W. (2d) 329, 339 Mo. 200; Marsh v. Bartlett, 121 S. W. (2d) 737, 343 Mo. 526.

The amendment provides that members of the General Assembly "shall * * receive the sum of one dollar (\$1.00) for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route." It is noticeable that mileage is allowable for "miles they shall travel in going to and returning from their place of meeting," and not from their county seat to the State Capitol Building. Such wording is definite, clear and certain and should be given effect. State ex inf. Norman v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154.

Thus, if Representative X lived five miles north of Columbia, Missouri, he would be entitled to such five miles in addition to the distance by highway 63 from Columbia to

the State Capitol Building, as such highway is apparently "the most usual route" from Columbia to Jefferson City.

As mileage is allowable on the basis of the most usual route, a question of fact may arise. These words evidently are not used in a technical sense and should be understood in their usual and ordinary meaning. State ex rel. Barrett v. Hitchcock, 146 S. W. 40, 241 Mo. 433; State ex rel. and to the use of Buck v. Railway Co., 174 S. W. 64, 263 Mo. 689. This language to us indicates the route most commonly used, or, the most popular way. The route might be by highway or railroad, depending upon general usage in each instance at the present time. It does not mean, however, that Representative X, hereinabove alluded to illustratively, could claim mileage by rail or highway from Columbia to Kansas City and thence to Jefferson City, as such would not be the most usual route from his residence in Boone County to Jefferson City and the State Capitol Building.

The base designated in the Constitutional provision is one dollar for every ten miles legislators shall travel in going to and returning from the State Capitol Building in each session. This is but another way of saying that each member shall be allowed ten cents a mile for each mile traveled on the most usual route from his home to the State Capitol Building, but only one round trip shall be allowed for each session. The argument may be advanced that the base is one dollar for each ten miles and that any fraction under ten miles would entitle a member to one dollar mileage, or, in other words, that each full ten mile unit would amount to one dollar, while a fraction over a ten mile unit would likewise entitle a legislator to one dollar. We do not believe that the voters intended to pay one dollar for a ten mile unit and an additional dollar for two miles in excess of a ten mile unit, but that the people actually intended that the legislators would be compensated ten cents per mile for the miles traveled.

"In determining the true meaning and scope of constitutional and statutory provisions, the intent and purpose of the lawmakers is of primary importance."

Graves v. Purcell, 35 S. W. (2d) 543, 1. c. 547, 337 Mo. 574.

Rep. W. N. McDonald
and Rep. R. H. Ridenhour

(4)

6-2-43

The draftors of the amendment evidently intended that members of the General Assembly were to be compensated upon the basis of the miles actually traveled on the most usual route, which would mean that the actual mileage is computed upon the basis of ten cents, rather than upon a unit of ten miles at one dollar.

CONCLUSION

In the opinion of this department, members of the General Assembly are entitled to mileage at the rate of ten cents per mile for each mile traveled in going from their home to the State Capitol Building, and return therefrom, once each session, or, mileage for one round trip, on the most usual or most commonly used route at the present time; and, it is a question of fact in each instance as to what route constitutes the most usual route.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

VCT:CP

- PROSECUTING ATTORNEYS: (1) Duties of prosecuting attorneys relative to the escheat statutes;
(2) Officers not allowed additional compensation for the performance of official duties.

January 21, 1943.

✓ 21
FILED
60

Honorable Robert I. Meagher
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Meagher:

The Attorney-General wishes to acknowledge receipt of your letter of January 14, 1943, in which you request an opinion from this Department. Your letter, omitting caption and signature, is as follows:

"Mary Fisher, a resident of this County, died more than a year ago, siezed of real estate which has been appraised at \$2500.00; administration has been had upon her estate and all debts paid, final settlement made and the balance of the personal property has been paid into the Escheat Fund of the State of Missouri, as provided for in Section 621 of the 1939 Revised Statutes of Missouri.

"Mrs. Fisher's only heir is Valburga Zaplletal, a sister who is not a citizen of the United States and who resides in Czechoslovakia.

"Please let me have an opinion from your department as whether this is a proper case under Article One of Chapter Three of the 1939 Revised Statutes of the State of Missouri for the prosecuting attorney to file an information and carry out the requirements of Section 620 to 642, inclusive,

1939 Revised Statutes of Missouri,
for said property to be sold and money
paid into the Escheat Fund.

"Also, let me have an opinion as to
Section 640 which provides as to whether
the compensation allowed to the Prosec-
cuting Attorney by the Court could be
retained by the Prosecuting Attorney or
must said compensation be paid into the
County Treasury as fees in criminal
cases."

Your request seems to be in two sections, the first
question being as to whether under the circumstances and facts
set out in your letter, you should file an information on
behalf of the State in the Circuit Court of your county asking
that the lands be escheated to the State of Missouri. Your
second question is as to whether or not under Section 640,
R. S. Mo. 1939, the prosecuting attorney is entitled to the
compensation called for in such section or whether it should
be paid into the county treasury of Madison County.

I.

In answer to question number one, this writer assumes
that the only question involved relates to the disposal of the
real estate which was a part of the estate of the person named
in your request, since your letter states that the personal
property has been paid into the escheat fund of the State of
Missouri.

Section 620, R. S. Mo. 1939, provides as follows:

"If any person die intestate, seized
of any real or personal property,
leaving no heirs or representatives
capable of inheriting the same; or,
if upon final settlement of an executor
or administrator, there is a balance
in his hands belonging to some legatee

or distributee who is a non-resident or who is not in a situation to receive the same and give a discharge thereof or who does not appear by himself or agent to claim and receive the same; or, if upon final settlement of an assignee for the benefit of creditors, there shall remain in his possession any unclaimed dividends; or, if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are non-residents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed; or, if, upon final settlement of the receiver of any company or corporation which has been doing business in this state, there is money in his hands unpaid and unclaimed, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

It appears from the section above quoted that if the only heir to the decedent's estate is not a citizen of the United States and is not "in a situation to receive" the property which he would be entitled to under the statutes of Missouri, then the property of the decedent, both real and personal, shall escheat and vest in the State of Missouri.

Section 625, R. S. Mo., 1939, provides as follows:

"When the prosecuting attorney shall be informed, or have reason to believe, that any real estate within his county has escheated to the state, and such estate shall not have been sold according to law, within five years after the death of the person last seized, for the payment of the debts of the deceased, he shall

file an information in behalf of the state in the circuit court of the county in which such estate is situate, setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre-tenants and persons claiming the same, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated and alleging that, by reason thereof, the state of Missouri hath right to such estate."

The section just set out above sets out the duties of the prosecuting attorney where he is informed or knows of his own knowledge that there is property in his county which, under certain circumstances, cannot be received by the legal heir. From your letter requesting this opinion it appears that the only heir of Mrs. Fisher is a resident of Czechoslovakia and is incapable of receiving the property which she is lawfully entitled to. It further appears from your letter that you, as Prosecuting Attorney of Madison County, had been informed or through your own knowledge are aware of such fact and that there is property in your county which she would be entitled to if she were capable of inheriting it. Section 625, supra, provides that if the prosecuting attorney knows of such condition that he shall then file an information in the circuit court of the county wherein he is an officer and where the property is located, requesting that in view of such circumstances the property should escheat to the State of Missouri.

Therefore, it is the opinion of this Department that under the circumstances and facts as set out in your request, and the provisions of Sections 620 and 625, that it would be your duty as Prosecuting Attorney to file such information as called for in Section 625.

II.

The second question about which you request an opinion is as to whether or not you are entitled to retain

Jan. 21, 1943

the compensation allowed the prosecuting attorney in Section 640, R. S. Mo. 1939.

Under and by virtue of Section 12939, R. S. Mo. 1939, the prosecuting attorney of your county is entitled and shall receive a certain specified salary. Thus, the question which you wish answered resolves itself into the question as to whether or not a prosecuting attorney is entitled to extra compensation in addition to that allowed him by law.

In the recent case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 344 Mo. 795, the Supreme Court of Missouri went into this question rather thoroughly and under the law as set out in that case an officer is not entitled to additional compensation where his salary is specifically set out by statute. It is true that if additional duties to those specified by statute are placed upon an officer that he may in certain instances receive additional fees or compensation. However, the duties specified under the escheat statute have reference to matters pertaining to and relating to the official duties of the prosecuting attorney and the services rendered pursuant to such statutes are within the scope of said official duties. As stated in Nodaway County v. Kidder, cited above, public policy requires that a public officer be denied additional compensation for performing official duties.

Therefore, it is the opinion of this Department that the compensation to the prosecuting attorney as specified in Section 640, R. S. Mo. 1939, shall not be retained by the prosecuting attorney but shall be paid into the treasury of Madison County as fees in criminal cases are paid.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

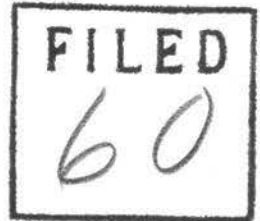
ROY MCKITTRICK
Attorney-General

JSP:EG

TAX SALE OF LAND FOR
DELINQUENT TAXES:

Right to redeem--limitations.

July 19, 1943



Honorable W. L. Meng
County Collector
Callaway County
Fulton, Missouri

Dear Sir:

We are in receipt of your letter of July 9, 1943, requesting an opinion, which letter is as follows:

"Would you please send us your opinion on this matter. We have four pieces of property in this County that was sold in the 1938 November land sale. This property was sold under the Trustees of the Missouri Methodist foundation & was bought by Henry M. Lampkin. After about four years the Trustees came to this office to redeem said property, at this time H. M. Lampkin had not demanded a deed. I told the trustees the redemption period was two years and that they could not redeem after that period was up. they in turn told me that after four years the property would revert back to them. The next day H. M. Lampkin came in and demanded a deed, saying he had entered the armed service before the four years were up and that his Business ceased on the day he entered the service.

"Do we give Mr. Lampkin a deed or,

"Do we let the trustees redeem said land. & if they redeem it, must they pay Mr. Lampkin the amount he paid at the sale plus interest. Would you please give us this opinion on this matter at your earliest convenience, Thanking you in advance, I remain."

Section 11149, R. S. Missouri 1939, providing for a period of redemption, is as follows:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

The manner of redemption is set out in Section 11145, R. S. Missouri 1939, which is as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of

July 19, 1943

eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Section 11147, R. S. Missouri 1939, contemplates that the owner may redeem the land sold after more than two years has expired since the date of the sale, which is evidenced by the concluding sentence of said section, which is as follows: "* * No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes."

An extensive discussion of these sections of the law is found in the very recent case of *Hobson v. Elmer, et al.*, (Mo. Sup., 1942), 163 S. W. (2d) 1020. The discussion is so comprehensive that we quote at length from said case:

"The first question presented is whether or not the owner of property which has been sold for taxes may redeem the same at a time more than two years subsequent to the sale date. It will be noted that in the present case no effort at all to redeem was made within the two-year period nor indeed until practically the end of the fourth year. In fact the plaintiff's guardian had not obtained legal title to the premises until about

July 19, 1943

a month prior to the attempted redemption. The answer to the question thus raised will depend upon a construction of certain sections of the Jones-Munger Act. It will be recalled that under that act lands upon which the taxes have become delinquent are advertised for sale by the collector. The purchaser at such sale is not given a deed directly but receives instead a certificate of purchase which he may not present to the collector until two years have elapsed since the sale. At the end of this two-year period he is required to present the certificate, to pay subsequently accrued taxes and certain fees and is then given a fee-simple deed to the property. We have held that after the sale and until the execution of the collector's deed legal title remains vested in the record owner of the lands, subject to a power in the certificate holder to obtain a deed by following the procedure provided for in Sections 11149 and 11150, R. S. Mo. 1939 (Mo. R.S.A. Sections 11149, 11150). Cf. *Donohoe v. Veal*, 19 Mo. 331; *Kohle v. Hobson*, 215 Mo. 213, 114 S. W. 952; *Hilton v. Smith*, 134 Mo. 499, 33 S.W. 464, 35 S. W. 1137 (all decided under former statutes). We have also said that the right of the certificate holder is in the nature of an equitable title similar to that of a vendee under a contract of sale. *State ex rel. City of St. Louis v. Baumann*, 348 Mo. 164, 153 S. W. 2d 31, loc. cit. 34. Obviously the title of the original owner may be transferred subject to the equities of the certificate holder. The right of the original owner to redeem the property and thereby destroy the power of the certificate holder to obtain a fee-simple title is granted by Section 11145, R. S. Mo. 1939 (Mo. R. S. A. Section 11145), and to determine when that right expires we must construe the provisions of that section. The opening sentence of the section last cited reads as follows: 'The owner or occupant of any land or lot sold for taxes, or any other per-

sons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner.' The statute then sets out the requirements that the redemptioner must meet. He shall pay the collector for the use of the purchaser the amount of the original bid, the costs of sale and interest at a rate specified in the certificate of sale which shall not exceed ten per cent. Upon such redemption the collector is required to notify the purchaser thereof and the mailing of this notice stops the running of interest. Then follows this provision: 'In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time.'

"Section 11147, R. S. Mo. 1939 (Mo. R.S. A. Section 11147), must also be read in connection with the above-quoted provisions: This section requires the redemptioner to pay to the certificate holder the value of any lasting and valuable improvements placed on the land by him, but it concludes with the following provision: 'No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes.' While the first sentence of Section 11145, supra, apparently limits the right of redemption to a period of two years following the sale, such a construction is negatived by the last-quoted words of the section and by the proviso contained in Section 11147, supra. If the right of redemption absolutely ceases at the end of two years there would be no purpose in a provision that the redemptioner could not be charged interest after the end of the two years and it would be unnecessary to state that the redemptioner

July 19, 1943

was not required to make compensation for improvements placed on the land before the expiration of two years and impliedly that he was required to make such compensation after the end of the two years, if he could not redeem at all after the end of the two years.

"We must, however, also take into consideration the language of Section 11149, R.S. Mo. 1939 (Mo. R.S.A. Section 11149); 'If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, * * * the collector of the county in which the sale of such lands took place shall execute to the purchaser * * * a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple.'

"There is one manner and, in our opinion, only one manner in which these seemingly conflicting provisions may be harmonized. We construe them to mean that the owner of the lands has an absolute power of redemption which cannot be defeated by the purchaser during and up to the end of the two-year period. Thereafter the purchaser has a right to obtain a collector's deed at any time within the next two years by complying with the various statutory provisions, to-wit: by producing to the collector his certificate of purchase, paying the subsequently accrued taxes and legal fees and demanding his deed. If, after the end of the two-year period and before the purchaser has complied with these conditions precedent to obtaining his deed, the owner or transferee applies for a redemption and makes the required payments he thereby destroys the power of the purchaser to obtain a deed."

Section 205 of the Federal Soldiers and Sailors Relief Act, as amended, is as follows:

"The period of military service shall not be included in computing any period now

July 19, 1943

or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

This section probably relieves a person in the armed forces from the limitation contained in Section 11137, R. S. Missouri 1939, which is as follows:

"In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale: Provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided."

We believe also that Section 301 of the Soldiers and Sailors Relief Act might also be applicable because contracts are specifically mentioned therein, and in the case of *Hobson v. Elmer*, supra, the Court held that the right of a certificate holder "is in the nature of an equitable title similar to that of a vendee under a contract of sale."

July 19, 1943

The rule of construction of legislation for relief of soldiers and sailors is well stated in volume 130 A.L.R. page 776 as follows:

"It has been held that it was not the legislative intent that the remedial purpose of the Soldiers' and Sailors' Civil Relief Act should be defeated by a narrow or technical construction of the language used. Thus, in *Clark v. Mechanics' American Nat. Bank* (1922; CCA 8th) 282 F. 589, it was held that a statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed by the exacting duties required of him, and unable to give attention to matters of private business. * * * * *

We are obliged to make our conclusion conditional because the facts set out in your letter are incomplete and indefinite, especially as to dates.

CONCLUSIONS.

It is the opinion of this department that the owners were entitled to redeem the property after the two-year period had expired and before the certificate holder had complied with the requirements of the law and demanded the deed, and the collector was in error in advising them that they could not redeem after two years had elapsed. Whether or not the owners were ready and willing to comply with the law concerning a refund to the certificate holder of the purchase money and interest is a question of fact not stated in your letter.

If the owners' tender of redemption was sufficient, no question of the limitations contained in Section 11137, supra, will be involved.

If the owners had been allowed to redeem on the date it was first demanded by them it appears from your letter that it would have been made within the four-year period and, therefore, Mr. Lampkin would have the right to his lien for refund and interest.

If the owners had made no proper attempt to redeem within four years after the sale and the certificate holder entered the armed services of this country before the four years had expired the certificate

Hon. W. L. Meng

-9-

July 19, 1945

holder's lien would be kept alive by the Soldiers' and Sailors' Relief Act. In such a case, the owners would still be entitled to redeem if they tendered the taxes and interest before the certificate holder made proper demand for a deed.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:DA

TAXATION AND REVENUE: County clerks duty to extend real estate taxes to the proper road and school districts; both real estate and personal property shall be placed on same list.

October 27, 1943

11-15
FILED

60

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Medlin:

The Attorney-General wishes to acknowledge receipt of your letter of October 19, 1943, in which you request an opinion of this department. This request, omitting caption and signature, is as follows:

"I would like to have an opinion on whose duty it is to place the school district numbers and the road district numbers on the real estate tax books made by the assessor.

"I would like to know if it is the duty of the Assessor or the County Clerk; also we would like to have an opinion in regard to the assessment of real estate, whether the assessor should place both personal property and real estate on the same list."

Your letter contains a request for our opinion on two questions, which we will take up in order.

I.

The first of these queries is whether it is the duty of the county clerk or the assessor to "place the school and the road district numbers on the real estate tax books." From your question we assume that your problem is as to whose duty it is to extend the taxes to the road and school districts.

It is the duty of the county clerk to deliver to the assessor on the first day of June of every odd numbered year, the assessor's book of the last assessment of real estate. This is provided by Section 10964, R. S. Mo. 1939, which is as follows:

"The clerk of the county court shall deliver to the assessor, on or before the first day of June, 1881, and every two years thereafter, the assessor's book of the last assessment of real estate, and the list of taxable lands furnished by the register of lands, and take his receipt therefor; and the assessor, as soon as he shall have completed his assessment and made his assessor's books for the year, shall return the whole of such papers and documents to the clerk."

The assessor is also furnished the proper book for use in the assessment of real estate. This is provided by Section 10973, R. S. Mo. 1939. Such section, in part, provides as follows:

"In all counties, except the city of St. Louis, the assessor shall be provided with two books, one to be called the 'real estate book,' and the other to be called the 'personal assessment book.' The 'real estate book' shall contain all lands subject to assessment.
* * *"

After these books have been furnished the assessor, it then becomes his duty to assess the real estate in his county under the provisions of Section 10950, R. S. Mo. 1939, as follows:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his

county, town or district, and assess the value thereof, in the manner following to wit: * * *

When the assessor has made his assessment as provided in the last mentioned section of the statute, he then returns the books to the county clerk under the provisions of Section 10964, supra.

At the time the assessor returns the books to the county clerk, the taxes have not been extended by the assessor. Nor do we find any provision making it the duty of the assessor to extend the taxes or to place the school district or road district numbers on the real estate books. However, under Section 11048, R. S. Mo. 1939, it is made the duty of the county clerk to extend these taxes. This provision is as follows:

"As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax book for the use of the Collector; and when the Assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the Clerk with the seal of the Court. And upon a failure to make out such extension of taxes in the Assessor's book or books, as the case may be, and deliver same to the Collector in the time specified, the County Court shall deduct twenty per centum from the amount of fees which may be due the Clerk for making such extension, and such Assessor's book, with the taxes so extended therein, shall be called the 'Tax Book.'"

It will be noted that the county clerk shall "extend the taxes therein in proper columns prepared for such extensions." It is, therefore, the opinion of this department that it is the

duty of the county clerk to extend the taxes on the real estate book "to the proper road and school district."

II.

The second question is whether the assessor should place both personal property and real estate on the same list. In the answer to question one, we cited a portion of Section 10950, R. S. Mo. 1939. In answer to this question, we feel that it is better that the entire section be cited, and so we call your attention to its provisions, to-wit:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property, in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain: first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1937, and every year thereafter, anything in this or any other section to the

contrary notwithstanding; second, a list of all the livestock, showing the number of horses, mares, and geldings, and their value; the number of asses and jennets, and their value; and the number of mules and their value; the number of neat cattle, and their value; the number of sheep, and their value; the number of hogs and their value and all other live stock and its value; third, an aggregate statement of all the farm machinery and implements, and their value; fourth, a statement of household property, including the number of pianos and other musical instruments, clocks, watches, chains and appendages, sewing machines, gold and silver plates, jewelry, household and kitchen furniture, and the value thereof; fifth, money on hand; sixth, money deposited in any bank, or other safe place; seventh, an aggregate statement of solvent notes unsecured by mortgage or deed of trust; eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust; ninth, an aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies; tenth, the number of bee colonies and their value; ten and one-half, all motor vehicles and their value; eleventh, all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 11309 and 11339, R. S. 1939), and its value; under this head shall be included all shares of stock or interest held in steamboats, keelboats, wharfboats, and other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all vehicles used in the

Oct. 27, 1943

transportation of persons (except of railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation. The word 'list' as used in Section 10996 of this Chapter shall include all the lists required under this section to be taken."

It will be noted that in prescribing what the list shall contain, the first thing mentioned is real estate; the remaining subsections are all a species of personal property. We think it clear that real estate and personal property shall be placed on the same list by the assessor.

Conclusion

Therefore, it is the opinion of this department, that it is the duty of the county clerk to extend the taxes on the "real estate book" and place such taxes under their proper road or school district. It is further the opinion of this department that both real estate and personal property shall be placed on the same list by the assessor.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

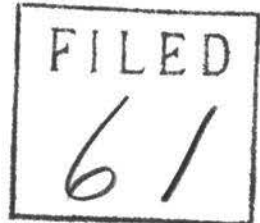
APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

CRIMINAL COSTS: Upon acquittal, even though an instruction on manslaughter is given on a murder in the second degree, the State is liable for the costs.

March 25, 1943



Honorable L. E. Merrill
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 23, 1943, in reference to the payment of criminal costs.

The facts stated in your request are as follows:

A charge of first degree murder was filed in one county in the State of Missouri, and was sent to an adjoining county on a change of venue, where three trials were had. At the first trial a conviction was had, which was reversed and remanded by the Supreme Court of this State; the second trial was a mistrial; and on the third trial the defendant was acquitted. The first two trials were had upon an information charging murder in the first degree, and the third trial, (in which, the acquittal was had) was on an information charging murder in the second degree.

Your question is whether the State of Missouri, the county where the case was tried, or the county where the case originated, should pay the costs.

Section 4223 R. S. Missouri, 1939, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in

in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It will be specifically noticed in this section, that it declares that the State shall pay the costs upon an acquittal in a case in which imprisonment in the penitentiary is the sole punishment for the offense.

Section 4378 R. S. Missouri, 1939, reads as follows:

"Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years."

Under the above section the sole punishment that can be had upon a charge of murder in the second degree is not less than ten years nor more than life in the State Penitentiary. The language of the two statutes are unambiguous and need no construction. It was so held in *Berry-Kofron Dental Laboratory Company v. Smith*, 137 S. W. (2d) 452, 345 Mo. 344.

Under the two above sections 4223 and 4378, the sole punishment upon conviction in the case described in the request, and described in the information, would be imprisonment in the penitentiary.

It is true that the court may instruct on manslaughter, or even as low as common assault, but the "measuring rule" as to who shall pay the costs is set out in the in-

March 25, 1943

formation upon which the defendant is tried. It was so held in the case of State ex rel. Timberman, Sheriff, v. Hackmann, State Auditor, 257 S. W. 457, 1. c. 458, 302 Mo. 273, where the court said:

" * * * From the record, in the case before us, it can be determined whether the jury ever reached the question of manslaughter at all. They may have found that there was no manslaughter in the case, and yet returned the verdict which was returned. To our mind the statute itself is clear and plain. In fixing the cases for which the state shall be liable for costs, in that it says:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state."

"Note the italicized language 'if the defendant is acquitted.' In such a case it cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute is speaking of certain offenses, and says, if the defendant is acquitted of such offenses, then the state shall pay the costs. It (the statute) says nothing about what might occur during the trial. It is dealing with the issues made by the pleadings. In this case the pleading upon the part of the state makes the issue that defendant is guilty of murder in the first degree. His plea of not guilty puts that charge in issue. Upon such issue it cannot be said that the state can refuse to pay the costs. * * * * *"

Honorable L. E. Merrill

(4) March 25, 1943

The above is the last and ruling case upon the payment of costs under the facts set out in your request, and under the facts set out in the above case.

CONCLUSION

It is, therefore, the opinion of this department, that where a defendant is acquitted on an information charging murder in the second degree, that, even though instructions on lesser charges, which may result in imprisonment in the county jail, are given, the State is liable for the costs and not the county.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

PROSECUTING ATTORNEY: May be "fee attorney" for the Reconstruction Finance Corporation.

May 17, 1943



Honorable L. E. Merrill
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

In your letter of May 10, 1943, you ask:

"I desire an opinion of your office as to whether or not the appointment of a Prosecuting Attorney by the R. F. C. as their fee attorney violates Section 4 of Article 14 in the Constituion of Missouri, which provides that an United States Officer shall not hold a State Office."

Section 4 of Article XIV of the Constitution of Missouri reads as follows:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

The first question is whether or not this section of the Constitution of Missouri is applicable to the factual situation in your question. This in turn depends upon whether or not you are an "officer" of both the United States and the State of Missouri by reason of the fact that you are a prosecuting attorney and also handle litigation for the Reconstruction Finance Corporation. The solution of the immediate problem can best be made by defining what is a "public office", and then determining whether the

May 17, 1943

activities of a "fee attorney" amount to a public office, for it generally follows that one who holds a public office is an "officer".

The term "public office" is defined in C. J., Volume 46, page 922, Section 2, as follows:

"'Office,' in the sense of public office, may be defined broadly as a public station or employment conferred by the appointment of government, or more precisely as 'the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public.' The term embraces the ideas of tenure, duration, emolument, and duties,
* * * * *

There is no doubt that your office, as prosecuting attorney, comes within that definition. The question then becomes, are the activities of a "fee attorney" for the Reconstruction Finance Corporation a public office within the criteria of the above definition. The primary criterion is whether or not the activity or "office" has delegated to it a portion of the sovereign power. This criterion is deemed the most important and reliable of the various tests. The court in the case of State v. Gray, 91 Mo. App. 438, l. c. 445, the court said:

"* * * * * But, aside from the declaration of a competent lawmaking body, no one should be considered a public officer whose duties do not pertain to an exercise of sovereignty or governmental function in some of the departments of government. Bun v. The People, 45 Ill. 397, 408. It will be found on examination, that no other definition shows a distinction between office and employment nearly so well. * *
* * * * *

Other criteria are tenure of the office and the permanency of the duties connected therewith, whether or not the office was created by statute or constitutional provision, whether or not it

is necessary for the holder of the office to give bond or take an oath before entering upon the duties therein, whether or not there is a specific designation as a public office, whether or not there is compensation for the discharge of the duties of the office and the liability which attaches to the holder of the office for nonfeasance or misfeasance. These tests have been used to determine whether or not the activity is a "public office."

If the facts give rise to a public office it is generally held that the holder of said office is an officer. In Words and Phrases, Volume 29, page 326-327, the term "one who holds office" is defined. Generally, the citations may be said to be summarized as in the case of State v. Kelly, 77 S. W. 996, 997; 103 Mo. App. 711, where the court said, quoting Bouvier's Law Dictionary:

"An officer is defined to be 'one who is lawfully invested with an office.'"

We understand the term "fee attorney" to mean one who may be hired by a person, corporation or so on, to handle a specific matter or controversy, and while so engaged to owe only a duty to that particular incident. Further, that while so employed the "fee attorney" owes no duty to accept future employment, but may reject or accept the employment as he sees fit. Also, this activity may be spasmodic in nature, that is the one hired may or may not receive future litigation to dispose of for the employer. Furthermore, whatever compensation the "fee attorney" receives is entirely dependent upon the work done, if any, and is not a set or predetermined compensation.

We do not believe that the activities of a "fee attorney", if our definition of such activities is correct, come within the scope of any or all of the above listed criteria so as to be classified as a public office. It follows that there being no office of "fee attorney" the fee attorney cannot be an officer. Not being an officer, the constitutional provision is not applicable. There being no other statutory or constitutional restriction applicable, a prosecuting attorney may accept such employment with the Reconstruction Finance Corporation.

However, a prosecuting attorney must discharge the duties of that office under Section 18, Article II of the Constitution of Missouri by personal devotion to said office. Also, Section 12942, R. S. Missouri 1939, provides generally as to the duties of a prosecuting attorney. It would be the emphatic suggestion of this

Honorable L. E. Merrill

-4-

May 17, 1943

office that you at no time subordinate the duties of prosecuting attorney to the demands of the Reconstruction Finance Corporation to act as attorney for that corporation.

CONCLUSION

A "fee attorney" for the Reconstruction Finance Corporation is not an office within the meaning of that term as used in Section 4, Article XIV of the Constitution of Missouri. Furthermore, a prosecuting attorney may be employed to act as "fee attorney" for the Reconstruction Finance Corporation.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WCB:EAW

INSURANCE:

FRATERNAL AND BENEFIT ASSOCIATIONS: Location of principal office
and executive offices.

June 8, 1943



Hon. Ross E. Millet
State's Attorney of DeKalb County
Sycamore, Illinois

Dear Mr. Millet:

We acknowledge receipt of your letter of May 20, 1943,
requesting an opinion, which letter is as follows:

"Some questions have arisen with reference
to the Insurance Laws of Missouri and I
am wondering if you would extend me the
courtesy of sending me a copy of your
opinion if you have passed on this subject,
and if not, would you give me your opinion
as to the following questions:

"1. Is it mandatory under Section 6008 of
Chapter 37, Fraternal Beneficiary Associa-
tions, to maintain its principal office in
the State of Missouri?

"2. Is it permissible for a Missouri
Fraternal Association to maintain an office
in the State of Missouri but maintain its
executive offices in a foreign State in
which it is authorized to do business?

"Any information you can furnish me on this
subject will be helpful and greatly apprec-
iated."

Section 6008 of Chapter 37, as it appears in Revised
Statutes of Missouri, 1939, referred to in your letter, has no
bearing on the location of the principal office or executive
offices of a fraternal benefit association. Said section mere-
ly provides for service of process upon foreign insurance com-
panies and associations not incorporated or authorized to do
business under the laws of this state.

June 8, 1943

The question contained in Part One of your letter is answered by Section 6124, R. S. Mo. 1939, which is as follows:

"Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be valid in all respects as if such meetings were held in this state. But its principal office shall be located in this state."

Section 6116, R. S. Mo. 1939, provides for the organization of fraternal benefit societies and is quite lengthy, and therefore is not set out in this opinion. Said section provides that a majority of the citizens forming the fraternal benefit society must be residents of this state.

Section 6108, R. S. Mo. 1939, provides for the exemption of fraternal benefit societies from the general insurance laws of this state, and is as follows:

"Except as herein provided, such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

We believe that the proposition contained in Part Two of your letter presents a question of fact and not a question of law. Section 6124, supra, specifically provides that the principal office shall be located in this state. When all of the executive offices are located in a foreign state, it could hardly be said that the principal office of the company would be located in this state.

We find no statute and no cases in the State of Missouri defining the term, "principal office" as used in this statute. The term has been defined when similarly used in other jurisdictions. In the case of Milwaukee Steamship Co.

v. City of Milwaukee, 53 N. W. 839, 840, 83 Wis. 590, 18 L.R.A. 353, it was held that a corporation's principal office is the place where the principal affairs, business and otherwise, of the company are transacted, and that an office for the annual election of officers, while its business is done elsewhere, is not a principal office.

In the case of Jossey v. Georgia & A. Ry., 28 S. E. 273, 274, 102 Ga. 706, it was held that the principal office of a corporation as fixed by itself includes only such offices as are created by the charter, or by the directory in pursuance of the charter, for the administration of the corporate affairs proper; but such term does not necessarily include merely the administrative offices of the company, and as so used is synonymous with the word "headquarters."

In the case of In re Lone Star Shipbuilding Co., C. C. A. N. Y., 6 F. 2d 192, 196, the court held that a Maryland corporation's voluntary petition in bankruptcy, stating that its principal office was in Southern District of New York, sufficiently alleged its "principal place of business"; "principal," as applied to such office, having no relation to statutory office, but to office where the major portion of the bankrupt's business is actually conducted.

It seems that the law does authorize the establishment of executive offices in foreign states and Section 6108, supra, specifically mentions the holding of meetings of legislative or governing bodies in any state.

All references made above are to domestic fraternal benefit associations. Foreign fraternal benefit associations need only comply with the provisions of Chapter 37, Article 13, and specifically Sections 6119, R. S. Mo. 1939, and Section 6120, as it appears in Laws of Missouri, 1941, page 404, relating to the administration and licensing of foreign fraternal benefit societies.

CONCLUSION

It is the opinion of this department that the principal office of all domestic fraternal benefit societies must

Hon. Ross E. Millett

-4-

June 8, 1943

be located in this state, and the principal office of foreign societies need not be located in this state, but that foreign fraternal benefit societies must comply with the requirements of Section 6119, R. S. Mo. 1939, and Section 6120, as the same appears in the Laws of Missouri, 1941, at Page 404.

It is the opinion of this department that executive offices of a fraternal benefit association may be located in any foreign state so long as the principal office can be determined from the intention and practice on the association to be located in the State of Missouri.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAPH

MUNICIPALITIES:
BOARD OF PUBLIC WORKS:

Retirement of bond issue.

June 18, 1943

7/1/43
FILED

62

Honorable R. Leroy Miller
Prosecuting Attorney
Trenton, Missouri

Dear Sir:

We are in receipt of your letter of June 10, 1943,
requesting an opinion, which letter is as follows:

"Could you please advise me in an
opinion as to the legality of the
following transaction:

"The City of Trenton, Missouri has
\$5000.00 in their sinking and in-
terest fund which they would like to
turn over to the Board of Public Works
to pay principal and interest due on
electric light bonds; and in turn the
Board of Public Works would turn
\$5000.00 out of their operating fund
to the City of Trenton, Missouri to
be placed in the city's contingent
fund."

We are also in receipt of your letter of June 16,
1943, giving additional information on the above proposi-
tion, which letter is as follows:

"In answer to your letter of June
14---Trenton is a third class city;
the \$5000.00 in the sinking and in-
terest fund was derived from taxation
as allowed by the statutes of the

State of Missouri for such purposes; a separate depository is set up for the monies collected by the Board of Public Works; and the bond issue for the light plant was under statutes authorizing a city of this class to issue bond for the purpose of building a municipally owned light plant.

"I hope this will help you in rendering a decision and if you need any further information, do not hesitate to write me for it."

Article 31 of Chapter 38, R. S. Missouri, 1939, provides for the acquisition and operation of municipally owned utilities and the issuance and retirement of bonds in connection with same. The bonded obligation under this article is not an obligation of the city, but is an obligation secured by the plants and properties acquired, as appears from the language contained in Sections 7812 and 7813, R. S. Missouri, 1939.

"Sec. 7812. Whenever a proposition shall be submitted and adopted by a majority of the voters of the said city voting on the proposition, then the said waterworks system shall be conveyed to the city by the person, firm or corporation owning the same, which deed shall convey to the city a valid title to said property except that such conveyance shall be subject to a vendor's lien for the purchase price of said plant, which shall be evidenced by bonds herein provided for, which shall be issued and delivered to the person, firm or corporation selling the property, in payment therefor. And the said city, for the purpose of paying for the waterworks plant, shall issue bonds to an amount equal to the agreed purchase price, which shall be known as the

'waterworks bonds,' and which shall constitute a first lien on the waterworks plant so acquired, and all the property connected therewith or thereafter acquired constituting a part of the said plant, including the income arising therefrom, it being the intent of sections 7806 to 7827, however, that there is to be no liability on the part of the city to pay the amount evidenced by said bonds out of any other fund than the one herein specified, and said bonds shall not constitute a liability of the city for which the general revenues thereof can be appropriated, or any part thereof, except to pay a reasonable fire hydrant rental for such hydrants as may be used by the city for the purpose of fire protection, and washing and flushing streets, crossings, alleys and sewers, as herein provided."

"Sec. 7813. The said waterworks plant and system, when acquired, shall be subject to the control and management of a board known as the 'board of waterworks commissioners,' who shall have the power to issue to the person, firm or corporation, in payment for said waterworks system, bonds in such denomination as may be stated in the proposition to the city or as may be determined by the board, which bonds shall refer to and recite sections 7806 to 7827, inclusive, as authority for their issuance, and shall be signed by each member of the board, attested by the secretary, under the seal of the board, and each bond shall contain substantially the following, among other appropriate recitals therein:

"This bond shall constitute a first lien, in the nature of a mortgage or vendor's lien upon all the property, rights, issues and revenue of the waterworks system in this city, or in any way appertaining thereto, including any and all funds that may have been or may be derived therefrom, whether in existence at the time of the issuing of this bond or thereafter acquired, but this bond shall not create any personal or general liability on the part of this city or the persons signing the same for the payment thereof, and the same shall be paid only out of the property constituting the waterworks system and the revenue derived therefrom, on which it shall be a first lien, as aforesaid, and in case of default in the payment of the principal hereof, or any interest due thereon, for a period of six months, all of the said property upon which it shall be a lien, as aforesaid, shall be conveyed by the waterworks commissioners to the holders of the waterworks bonds in the proportion that the bonds held by each bears to the entire bond issue: Provided, that said property may be conveyed to a trustee designated by a majority of the bondholders, to be held for the use of all the bondholders in the proportion aforesaid, and the conveyance of the said waterworks commissioners shall also convey all obligations due to the said board of waterworks commissioners from private corporations, individuals, or this city on account of water furnished or consumed, and shall also convey to them, their grantees and assigns, the right, privilege and franchise to continue thereafter the maintenance and operation of said waterworks system for a period of thirty years, and for that

purpose to have the use of the streets, avenues, alleys and other public places of the city to maintain and operate the said waterworks plant.'

"The said bonds shall run for a period of twenty years and draw interest at the rate of six per cent per annum, payable semi-annually, said interest to be evidenced by the coupons attached. The bonds and coupons shall be negotiable in form. The coupons may be signed only by the lithographed signatures of the president of the board and the secretary thereof."

Article X, Section 20, of the Missouri Constitution prohibits the diverting of funds, and is as follows:

"The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

Section 7825, R. S. Missouri, 1939, provides that the funds raised under Chapter 38, Article 31, R. S. Missouri, 1939, shall not be diverted, and is as follows:

"The board of waterworks commissioners and the manager of the waterworks system shall be liable on their bonds for any willful or negligent misappropriation of the moneys or properties of the waterworks system, and no part of the said moneys or properties shall be diverted from the depository selected as provided in sections 7806 to 7827, inclusive, nor shall the city council or other officers

June 18, 1943

of the city have any power to divert the same, and the city, or any holder of the bonds issued under said sections, may at any time enjoin the misappropriation or waste of the funds of the waterworks system, or may by mandamus proceeding compel the raising of sufficient funds to comply with the provisions of section 7820, or the performance of any other duty enjoined on them. Any money recovered from any member of the board of waterworks commissioners, or the manager of such waterworks plant, or any sureties on their bonds, for failure to perform their official duties, or for the misapplication of any of the money or properties of the waterworks system, shall be paid into the depository selected under sections 7806 to 7827, inclusive."

Part III of Section 7820, R. S. Missouri, 1939, provides for the setting up of a sinking fund for the payment of said bonds, and further provides that, "Said sinking fund to remain in the depository to be selected as herein provided, and to draw interest."

We also submit herewith a copy of an opinion dated April 30, 1943, addressed to Honorable A. F. Pulliam, City Clerk, Sullivan, Missouri, which discusses the general question of handling the funds derived from the operation of a municipally owned light plant acquired under Chapter 38, Article 31, above mentioned.

We find no decisions rendered by the appellate courts of this state construing the provisions of said Chapter 38, Article 31, involving the questions under consideration.

CONCLUSION

The \$5000.00 in the sinking and interest fund, having been derived from taxation, cannot be used to pay the principal and interest due on the electric light bonds

Honorable R. Leroy Miller

-7-

June 18, 1943

because such use would be a diversion of funds raised by taxes belonging to the city for the payment of an obligation that is not an obligation of the city. As long as any of said bonded indebtedness remains unpaid, the \$5000.00 that the Board of Public Works proposes to turn over to the City of Trenton to be placed in the city's contingent fund should not be turned over to the city because such action would be in violation of Section 7825, R. S. Missouri, 1939, in that it would be a diversion of the fund from the purpose for which it was accumulated. We are of the opinion that there is no law prohibiting the Board of Public Works from applying the \$5000.00, or any other funds in its operating fund, toward the payment of principal and interest due on the bonds which are secured by the plant from the operation of which plant said funds were accumulated.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LAP:HR

MUNICIPALITIES: City of fourth class cannot annex a fire district until they have complied with Section 34 of the Fire District Act.

July 2, 1943

Hon. Forrest Mittendorf
House of Representatives
Jefferson City, Missouri



Dear Sir:

We are in receipt of your letter of July 1, 1943, wherein you request an opinion from this department, as follows:

"Please furnish me with an opinion on the following matter:

"In August of 1942, a fire district was incorporated in St. Louis County, known as the fire district of community, in accordance with a law passed by the 61st General Assembly, found on Page 505 of the Session Acts of 1941. At an election held in October of 1942 the City of Overland, a 4th class city, took in the entire corporate limits of the fire district of community. On July 6th there will be an election held by the people of the territory annexed by the City of Overland to diminish the city to its original corporate limits, under authority of Section 7097, Revised Statutes of Missouri, 1939. Please deliver me the opinion on this particular point - in the event that the city is diminished to its original limit, will the fire district of community remain at its status as before annexation by the city in October of 1942.

"Section 34 of the fire district law provides that no city shall annex any of the.

fire district unless it takes in the entire district. The law provides further that the city shall assume all property, real and personal, and pay all debts and obligations of the district. The City of Overland has not taken over the books of the fire district nor paid any of the costs of the incorporation of the district, and it did not pay any of the salaries of the fire district trustees prior to the annexation of the fire district.

"I am of the opinion that since the City of Overland did not take over the books of the district nor pay any of the obligations of the fire district, that the district was not taken over by the city. Kindly furnish me an opinion in the event that the people of the fire district who were annexed by the city, in the election of July 6th, vote to return the city to its original limits, if the fire district will still be as it was before it was annexed by the City of Overland."

Section 34, Laws of Missouri, 1941, page 516, reads as follows:

"No village or city shall annex any part of any fire district herein created unless said city shall annex the whole of said district. In the event of annexation, said village or city shall assume all debts and obligations of the district, and thereafter all property, real or personal, owned by the district shall be vested in said village or city. No village or city shall be incorporated within the boundaries of any district unless said village or city shall include the area of the entire district."

Section 7097, R. S. Mo. 1939, partially reads as follows:

"* * * The mayor and board of aldermen of such city, whether the same shall have been incorporated before becoming a city of the fourth class or not, with the consent of a majority of the legal voters of such city voting at an election therefor, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city: * * * * *

Section 34 being a later section is an implied conditional amendment to Section 7097, R. S. Mo. 1939, which is a general law in so far as to territory included in a fire district as set out in the Laws of Missouri, 1941, page 505.

Section 34 is also a special statute, in reference to the conditions imposed on extension of territory of a city of the fourth class to obtain territory which consists of a fire district.

Where general terms, or expressions, in one part of a statute are inconsistent with a more specific or particular provision, or provisions, in another part of a statute, the particular provision must govern unless the statute as a whole clearly shows the contrary intention, and it must be given effect notwithstanding the general provision is broad enough to include the subject to which the particular provision relates. *Jacoby v. Missouri Valley Drainage District of Holt Co.*, 163 S. W. (2d) 930.

Where there is a general statute and a special statute in reference to the same matters, the special statute controls. *State v. Richman*, 148 S. W. (2d) 796.

Two statutes relating to the same subject must be read together and the provisions of the one having special application to a particular subject will be deemed a qualification of, or "exception" to the other statute general in its terms. *Eagleton v. Murphy*, 156 S. W. (2d) 683. Since Section 7097, supra, applies generally to the annexation of adjacent territory and since Section 34, Laws of Missouri, 1941, page 516, applies particularly to the annexation of territory in which there is a fire district, Section 34 is the controlling section.

Section 34 of the Laws of Missouri, 1941, page 516, specifically sets out the procedure of the annexation of a district where a fire district is located. And, in that section, it specifically states " * * * said village or city shall assume all debts and obligations of the district, and thereafter all property, real or personal, owned by the district shall be vested in said village or city." Under the facts in your request the city has not paid any of the costs of incorporation of the fire district or any of the salaries and wages due the district trustees, which, we are assuming, has not been paid, and has not taken over any of the books of the fire district. The city, therefore, has not complied with the procedure set out in Section 34 for the annexation of the territory containing the fire district. The mention of one thing in a statute implies the exclusion of another thing. *Kansas City v. J. I. Case Threshing Machine Co.*, 87 S. W. (2d) 195. Also, the expression of one thing in a statute is the exclusion of another. *State ex rel. Kansas City Power and Light Co. v. Smith*, 111 S. W. (2d) 513.

Section 34, supra, specifically states " * * * the village or city shall assume all debts * * * ." Section 34, as worded, is mandatory and before the annexation is completed the city must comply with that section. It clearly shows that it was the intention of the Legislature that before the annexation is completed that the city should assume all debts and obligations of the district and that thereafter all property, real or personal, owned by the district shall be vested in said city. Under the facts as stated in your request, we are assuming that the city has not taken the steps described in Section 34. And, in that event, if the city should, under Section 7097, supra, with the consent of the legal voters, diminish the city limits so as to exclude the

territory consisting of the fire district, the fire district has the same status as before the alleged annexation of the territory was voted upon by the people in the city. In reading Section 34 it can only be said that the conditions set out therein are mandatory. *Morris v. Karr*, 114 S. W. (2d) 962.

CONCLUSION

It is, therefore, the opinion of this department that the fire district which was incorporated in St. Louis County in August of 1942, which was known as the fire district of the community, has not lost its identity as a fire district incorporated under the Session Acts of 1941, page 505, for the reason that the annexation of the territory, including the fire district had not been completed for the reason that the city had not complied with Section 34 of the Fire District Act.

It is further the opinion of this department that the territory consisting of the fire district has not been annexed at this time for the reason that the city has not complied with Section 34 of the Fire District Act as set out on page 505, Laws of Missouri, 1941.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WJB:CP

TAXATION:
ADMINISTRATORS AND
EXECUTORS:
DISTRIBUTION OF ESTATES:

An executor or administrator may at his own peril distribute personal property of the estate without an order of the Probate Court and if such distribution is made before the tax-assessment date, then the estate is not subject to be taxed on the properties so distributed.

July 13, 1943

Hon. Jesse A. Mitchell
Chairman, State Tax Commission
Jefferson City, Missouri

7/15
FILED

62

Dear Sir:

This is in reply to yours of recent date wherein you submit the following questions:

"(1) Is an administrator or an executor or the estate liable or subject to a personal property tax on property distributed by an administrator or executor, when distributed prior to June 1st, the taxable date, without obtaining an order of distribution from the Probate Court.

"(2) Is an administrator or an executor or the estate liable or subject to a personal property tax on property distributed prior to June 1st, the taxable date, without obtaining an order of distribution from the Probate Court, if the Probate Court thereafter approves such distribution by the approval of a settlement subsequently made in which credit is taken for such distribution.

"(3) May an administrator or an executor of an estate distribute personal property without an order of the Probate Court. (The determination of this question will be a guide to be followed by the tax-collecting agencies should the Probate Court at any time refuse to approve a settlement in which credit is sought for distribution made without a prior order of the Court)."

Under Section 10940 R. S. 1939, it is provided that every person holding or owning property on the first day of June shall be liable for taxes thereon.

Under Section 10950 R. S. 1939, it is the duty of each taxpayer to list all property owned by such taxpayer or under his care, charge or management. Under Section 10957 R. S. 1939, provisions are made for the assessing of the assets of estates which are in Probate Court. This section reads in part as follows:

"It shall be the duty of every judge of the probate court in each county in this state to certify to the county assessor, on the first Monday of June in every year, a written list of every administrator, executor and guardian, and of every other person legally in charge and control of any estate in the probate court; and thereafter, and upon such certification, it shall be the duty of the county assessor to take from each administrator, executor, guardian, and every other person legally in charge and control of any estate in such probate court, or from the papers and records of the court relating to such estates, a list of personal property, and to assess the same according to law--such property hereby being declared to be subject to taxation in said county for all lawful purposes whatsoever, so long as the probate court thereof retains jurisdiction of such estate; * * * *"

Your first question goes to the question of the liability of the executor for taxes on property which he distributed prior to the first of June and without an order of court authorizing such distribution. In searching the statutes on this question, we do not find any provisions therein which would prohibit the executor or administrator of an estate from making a distribution before the time the semi-annual settlement expires.

Under provisions of Section 235 R. S. 1939, it is provided that the executors shall not be compelled to make a distribution

July 13, 1943

untill six months after the date of letters. It will be noted however, that this does not prohibit the executor from making a distribution sooner than the six months after the date of letters if he is willing to assume the responsibility that he may acquire on account of making the early distribution.

Under Section 105 R. S. 1939, it is provided that the Probate Court may at any time make such orders as the interest of the estate may require for the speedy collection of debts or for the sale and distribution of personal property. However, under this section, even if the Probate Court makes an order of distribution within six months after letters have been granted, the executor under Section 235 would not be required to make the distribution until after six months of the date of the letters. In Volume 2 of "Missouri Practice and Forms" by Limbaugh at Section 927, the author makes this statement:

"Since settlement cannot be made until after the estate has been in the process of administration for six months, no partial distribution can be made until six months after the date of letters."

This statement may be correct. However, it does not hold that a distribution which is prematurely made would be void and that ownership of property so distributed would not pass to the distributee. In Volume 24 C. J. at page 473, Section 1281, we find the rule as to making distribution of estates stated as follows:

" * * * Nevertheless, it is the duty of the representative to make distribution as soon as is consistent with the rights of creditors and his own safety; and where it is made apparent that there are more assets on hand than will be necessary for the payment of debts and expenses of administration, the court may direct distribution before the time ordinarily allowed for settlement of estates has elapsed, or, under such circumstances, the representative may pay over legacies or distributive shares in advance of such time, taking a refunding bond from those who are thus paid. * * *"

In the case of Young v. Thrasher, 48 Mo. Appeal 327, 335, a question similar to the one here under consideration was before the St. Louis Court of Appeals. In that case, the executor previous to final settlement paid out amounts to distributees without an order of court. In speaking of this payment, the court said:

"* * * * * The mere fact that the money was paid to Henry C., without first obtaining an order of distribution, could not affect the question on the merits, because, if nothing had been paid Henry C., he would have been entitled to an order of distribution in his favor for at least \$300. * * *"

This case is cited as authority for the rule that an administrator is entitled to credits in his settlement with estate for payment made to a distributee without any order of the probate court, if the amount paid is not more than the distributee is entitled to.

The only reason the executor could be held liable for taxes on properties of the estate which he distributed without and order of Probate Court would be that such distribution is without authority and void and therefore under the law, the executor still has these assets under his care, charge or management and therefore should list them for taxes.

In 24 C. J. at page 498, paragraph 1339:

"Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril, although the representative acted in good faith in making such payments, and in ignorance of the existence of any debt or claim against the estate. Such distribution is, however, perfectly legal, and divests the personal representative of title to the property delivered to the legatee or distributee. Furthermore the representative may be entitled to credit for the payments made, if they

are correct and not more than the recipient's distributive share, and will be protected by a subsequent decree authorizing such payments, or allowing an account in which such payments are stated."

Also in Woerner American Law of Administration, Third Edition, Volume 3, page 1793, paragraph 519, we find the rule stated as follows:

"The same rule holds good in respect of payments to adult distributees and legatees. The accountant (administrator or executor) is entitled to credit against these to full extent of payments made to them whether ordered by the court or not. The executor or administrator may vest in the distributees both title and possession of their respective shares before an order of distribution is made, or without any such order."

In the case of Burns v. Burns, 137 Federal 781, the court held that a conveyance by an administrator to distributees of their respective shares of personal properties of an estate which is not previously authorized but which is subsequently approved by the Probate Court divests the administrator of all title and interest therein and invests it in the distributee as on the date of the conveyance. In Volume 126 A. L. R. the annotator treats the subject of the right of the executor or administrator to credit on account of advances of distributees before obtaining an order of distribution. At page 781, the general rule is stated as follows:

"It is a general rule that an executor or administrator is entitled to credit on account of advances to, or disbursements in behalf of, distributees before obtaining an order of distribution, where such distributees would have been entitled to such sums upon final distribution."

Decisions from the courts of twenty-eight states and Federal Court of the United States are cited in this annotation as supporting this rule. The case of Young v. Thrasher,

July 13, 1943

supra, is cited as authority for application of this rule in Missouri.

CONCLUSION.

From the foregoing, it is the opinion of this department that;

(1) An administrator or executor of the estate administered upon is not liable or subject to a personal or property tax on property distributed by an executor or administrator prior to the tax assessment date where such distribution is made without an order of Probate Court.

(2) The rule announced in paragraph 1 herein is applicable even though the Probate Court approves the distribution by the approval made subsequent to such distribution.

(3) An administrator or executor of an estate may distribute personal property without an order of Probate Court, but he is liable under his bond for making an unauthorized distribution without an order of court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

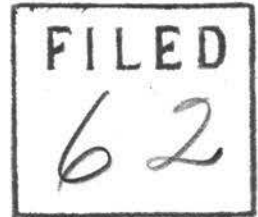
APPROVED:

ROY MCKITTRICK
Attorney-General

TWB:PD

TAXATION, DELINQUENT- Refunds for taxes derived from
erroneous sales of delinquent
lands should be paid out of the
County Treasury.

July 29, 1943



Hon. John W. Mitchell
Ass't Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

This is in reply to yours of recent date
wherein you make the following statement and request:

"Section 11155 reads in part as follows:

'Whenever the county collector
shall discover, prior to the con-
veyance of any lands sold for
taxes, that the sale was for any
cause whatever, invalid, he shall
not convey such lands; but the
purchase money and the interest
thereon shall be refunded out of
the county treasury to the purchas-
er, his representatives or assigns,
on the order of the county court.'

"Section 11156 provides that in certain
instances, a tax sale made by the county
collector shall be invalid, and then the
statute provides:

'And for the first two enumerated
causes, the money paid by the
purchaser at such void sale shall
be refunded, with interest, out
of the county treasury, on order
of the county court.'

"Our attention has recently been called to
two or three cases in Buchanan County where
tax sales apparently are void for the first
of the two reasons specified in Section
11156, and the purchaser at the tax sale
has requested that his money be refunded
under Section 11156.

"As we all know, the proceeds of a tax sale are distributed in the same proportions and to the same political subdivisions as the taxes themselves would have been distributed, if paid. In our case, the money received from the purchaser at the tax sale would be distributed among the state of Missouri, the general revenue and the special road and bridge revenue of Buchanan County, the interest funds and the sinking funds of three separate Buchanan County bond issues, and the country school district.

"If the county court should decide that a refund should be made in this case, the question arises as to which of the various funds named above should furnish the money with which to make the refund. Perhaps each of the funds referred to should be charged with its proportionate part of the refund; but there is one difficulty in applying that plan, which is, that the state's part of the revenue never gets into the treasurer's hands so as to enable him to charge any part of such a refund against the state revenue.

"We shall appreciate it if you will, at your convenience, give us your opinion as to the proper procedure to follow under each of the sections referred to above in making refunds to those who have purchased lands at delinquent tax sales."

From the sections which you have quoted it appears that the lawmakers have intended that these refunds be paid out of the county treasury. While it may seem inequitable to charge the county treasury with these items, yet we find no provision in the Constitution which would prevent the General Assembly from making such a provision.

Under Section 1 of Article IV of the Constitution the legislative power is vested in the General Assembly. It is only limited by the provisions of the State and Federal Constitution.

July 29, 1943

The foregoing statutes make no provision for charging these refunds to the accounts which received the benefits of them. Section 11215 makes provision for refunds of taxes collected on illegal levies, but this section does not apply to refunds under the sections which you have quoted in your request.

The payment of such refunds would come within class 5 of The Budget Law as amended laws, 1941, page 650 - 651 which is as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

CONCLUSION

From the foregoing, it is the opinion of this department that refunds of taxes and interest derived from the erroneous sale of delinquent lands for taxes should be paid out of the county treasury from funds in class five (5) which is for contingent and emergency expenses.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:PD

SCHOOLS: Schools having average of less than fifteen pupils in attendance may be closed by Board of Directors, State Superintendent of Schools, or by temporary combination for educational purposes. Boards of district schools under superintendency of county superintendent of schools shall set up bus routes. Assignment of pupils to school most accessible is duty of county superintendent of schools.

September 17, 1943



Mrs. Richard Mileham
Acting County Superintendent of Schools
Clark County
Kahoka, Missouri

Dear Mrs. Mileham:

This is in reply to your letter of September 10th, 1943, requesting an opinion from this department. Your letter reads as follows:

"If a school has less than fifteen pupils can a school board decide to close the school for the year and transport the pupils?

"Who is to set up the bus route?

"If one family lives on the extreme north of the district and have never sent their children to this district when it was operating must the school board furnish transportation for them now that the school is closed?

"Will you please answer these questions for me?

"If I have not been specific or clear enough please let me know and I'll be glad to explain the situation more in detail."

Since your letter does not indicate which, of three plans provided in our statutes for the closing of schools

you contemplate using, we set out the various statutes as they might apply in this case.

Schools with less than fifteen pupils may be closed under the provisions of various statutes:

Section 10324 R. S. Mo. 1939, after providing for the maintenance of school for an eight months' term, reads:

"* * * Provided, that in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated, and, if desired, arrange for transporting children to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

Under Section 10464, R. S. Mo. 1939, we find:

"If any district in this state shall have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall, in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid

by the state, shall not exceed the amount that the state would have otherwise paid to such district."

Section 10457, R. S. Mo. reads as follows:

"Two or more districts may combine temporarily for educational purposes should the school boards of all districts concerned agree to transport the pupils of one or more districts to a schoolhouse elsewhere, and such districts shall receive the same apportionment from the state school fund as they would otherwise have received, and may use such funds, or any part thereof, in transporting pupils: Provided further, that in such temporary combinations the record of daily attendance of pupils from each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments."

It would seem from the foregoing that under that portion of Section 10324, R. S. Mo. 1939, under our scrutiny, a school may be closed by the board of the district and the question of transportation must be ratified by a two-thirds vote of the qualified voters. Under this arrangement the teachers' fund of the district defrays the tuition charges and the incidental fund the cost of transportation to the other district.

Under Section 10464, R. S. Mo. 1939, the State Superintendent of Schools may close a school in a district if the school has an average attendance of less than fifteen pupils. He may require the directors to arrange transportation of pupils and the expense incident thereto. Under this section, both the teachers' fund and the incidental fund may be used to pay transportation as well as tuition costs.

Under Section 10457, R. S. Mo. 1939, which provides for a temporary combination for educational purposes, it is contemplated that the districts are to pool their funds for the payment of teachers' salaries. The purpose of such a consolidation being a conservation of expenses, it would seem that under such

an arrangement the pro rata expense is borne by the participating districts.

In discussing the matter of transportation, we call your attention to the provisions of Section 10327, R. S. Mo. 1939. Because of its extreme length we do not set this section out in detail but merely cite same for your future study.

Devoting our attention to the next question raised in your letter, "Who is to set up the bus route?" we find, at Section 10327-a, Laws of Missouri 1941, page 547, the following:

"The county superintendent of schools in each county of the state shall act as supervisor of school transportation established by common school districts. It shall be his duty to confer with and advise the school boards of common school districts of his county in all matters pertaining to school transportation and he shall assist such school boards of his county in establishing routes and contracting with drivers, and his office shall be available to the school boards in his county for meetings for the purpose of solving their transportation problems. * * * *"

Coming now to the problem of the family living in the extreme north of the district, we find Section 10461, R. S. Mo. 1939, would apply in this case. This section reads:

"Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the assignment,

subject to an appeal to the state superintendent by any county superintendent whose county is affected, and the decision of the state superintendent shall be final: Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

CONCLUSION

It is, therefore, the opinion of this office that a school having less than fifteen pupils in average attendance for the preceding year may be closed (1) by action of the board, subject to approval of the vote of two-thirds majority of the qualified voters in the district; (2) by the State Superintendent of Schools; and, (3) by a temporary combination for educational purposes with other schools.

It is further the opinion of this department that transportation of school pupils, the establishing of routes, and contracting with drivers, etc., are duties devolving on school boards of common school districts, with the assistance, advice and superintendence of the County Superintendent of Schools.

And, further, that the assignment of pupils to the most accessible district is a duty incumbent on the County Superintendent of Schools.

Respectfully submitted,

L. I. MORRIS

Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LIM:CP

COUNTY CLERK:1) No authority to collect principal and interest on school fund loans -- not liable on official bond for such funds inadvertently collected.
COUNTY COURTS:2) Have no authority to allow borrower and sureties to execute new bonds and mortgage for sole purpose of reducing interest rate.
STATUTES: 3) Section 10386 Laws of Missouri 1943, procedural in character-- applies to prior and subsequent school fund loans.
November 10, 1943

Honorable Leo Mitchener
County Clerk
Ripley County
Doniphan, Missouri

Dear Sir:

We are in receipt of your letter of November 3, 1943, wherein you request an opinion of our Department which request reads as follows:

"My attention has been called to an opinion handed down by you concerning interest on school fund loans. I would like to have some information on this question. In Ripley County, all school fund mortgages have drawn up to draw 8% interest and for a number of years now the County Court has each year made an order setting the rate of interest at 5%, and that is what has been collected. I have been informed that this is not legal (I have not seen the opinion from your office).

"What would happen to me or to my bond if I go ahead and accept 5% interest in compliance with this Court order as has been done in the past instead of collecting 8% as set out in the face of the mortgage?

"Should the court order a renewal on all these loans in order to draw the mortgage up at 5%, then would they all come under the new law (Senate Bill #13) and have to have appraisers to go out and appraise the land etc. Also many of the bondsmen could not qualify under the new law, that is the ones that are now on the bonds. It seems that this would work an undue hardship on many persons who now have loans, and would seem quite unfair to charge 8% on the old loans and all the new loans made hereafter drawing 5%. There is perfect harmony between the County Court and myself in the matter, and we just want to get a clear understanding of what we can and should do."

11-15
FILED

62

November 10, 1943

In reply to the same, we are herewith enclosing an opinion rendered by this Department on June 24, 1943, to Mr. Charles S. Greenwood, and we trust that it is the one referred to in the first portion of your letter.

Now turning to your question which reads as follows:

"What would happen to me or to my bond if I go ahead and accept 5% interest in compliance with this Court order as has been done in the past instead of collecting 8% as set out in the face of the mortgage?"

Section 13285, R. S. Mo. 1939, provides as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

It will be noted from the reading of the above section that it is provided:

"***The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, * * *"

We find that the court in the Case of Newton Burial Park vs. Davis, 78 S.W. (2d) 150, 1.c. 153, had this to say:

"***The bond of Davis is only liable for the money he actually received by virtue of his office. Davis cannot bind his bond by receiving for money he never received and could not

have received by virtue of his office.'***"

Before discussing the ruling in the Davis Case Supra, we wish to call attention to Section 10388 which provides as follows:

"When any portion of principal or interest, or both, may be collected, as provided in any of the foregoing sections, it shall be paid into the county treasury; and it shall be the duty of the treasurer to give the person making payment thereof duplicate receipts, specifying the sums paid and on what account. One of said receipts shall be given to the clerk of the county court, who shall file and preserve the same in his office, charge the treasurer with the amount, and credit the payment to the party on whose account it is made on his bond and mortgage."

The above section was construed in the Case of Knox County vs. Goggin, 105 Mo. 182, 16 S. W. 684, wherein the court said:

"This section makes it the clear duty of the mortgagor to pay the money to the county treasurer and then present the duplicate receipt to the county clerk. Hence it was held in the case of State ex rel. v. Moeller, 48 Mo. 331, that it was not the duty of the county clerk to collect the proceeds arising from the sale of swamp lands, or from the sale of the sixteenth section. That was a suit on the bond of the county clerk, and it was held that the clerk and his sureties were not liable on his bond for such moneys, because it was not part of the duties of the clerk to receive the same. Says the court: 'We cannot make him a county treasurer, or collector proper, without nullifying other provisions of the statute and throwing into confusion our whole system of county finances.' The case just cited and State to use v. Bonner, 72 Mo. 387, set at rest the questions in hand, and show that the county clerk had no authority to collect the money due upon this bond and mortgage. It also follows that his

deputy had no such authority. When Brown gave the money to the deputy clerk, he made the deputy clerk his agent for the purpose of paying off that debt, and the county is in no way responsible for the misconduct of the deputy in not applying the money as directed, for the deputy in receiving the money was not acting within the scope of his duties, but outside of them."

Therefore, in answer to the first question we must conclude that the sureties on a county clerk's bond could not become liable for the collection by a county clerk of either principal or interest on a school fund bond for the reason set forth in the Davis Case Supra, and especially in view of the fact that section 10388 significantly provides that such money must be paid to the county treasurer thereby precluding said bond money from being actually received by the county clerk by virtue of his office.

We shall next turn to your second question wherein you ask:

"Should the court order a renewal on all these loans in order to draw the mortgage up at 5%."

In the Case of Saline County vs. Thorpe, 88 S. W. (2d) page 183, the court in paragraph 4 of said case, reviews the several statutes controlling the handling and investing of school funds. From paragraphs 5 and 7 we quote as follows:

"The purpose of requiring a bond and personal security is, of course, to make it possible to collect the debt even if the land, securing the loan, decreases in value. The county court has no authority to give any right of the county to collect either principal or interest, due (Veal v. Chariton County Court, 15 Mo. 412), or to dispense with either the bond, with its personal obligation to repay the money, or the mortgage conveying clear land as security. Lafayette County v. Hixon, 69 Mo. 581. Neither does it have authority to release a surety from his liability upon the bond or to take in payment of the amount due or any part thereof, upon a school fund bond and mortgage, a note which does not conform to the statutory requirements. Mont-

November 10, 1943

gomery County v. Auchley, 103 Mo. 492, 15 S. W. 626. Why should it have any authority to release one who borrowed from this fund from his obligation to repay it? * * *

* * * If a county court could release the obligation to repay school fund loans, at its own whim or pleasure, for any chips and whetstones, the intent of the statute to safeguard the public school funds by requiring double security of unencumbered land, in every loan, would be nullified. * * *

Therefore, we must conclude that in the absence of a section in the statutes which gives a county court the right to cancel the bonds given for the receipt of school fund moneys by a debtor, which bonds are secured by a school fund mortgage and in lieu thereof, to allow the debtor to execute new bonds with new sureties or with the same sureties and secured by the same lands as was described in the original school fund mortgage for the sole purpose of reducing the interest rate. (We use the word "sole" advisedly for there are many instances where it is perfectly legal to take new bonds and mortgages in place of the old.) This in our opinion, would be a subterfuge and to tolerate such a practise would be to allow the county court to do indirectly that which they could not do directly, for we have pointed out in the opinion hereto attached, that they could not reduce the interest rate through an order of the county court or a rider placed upon the school fund mortgage or bond and, therefore, if they were allowed to take new bonds and mortgages obligating the debtor to pay a lower rate of interest for the use of the same money would in our opinion, be a mere subterfuge and illegal, and we think we are supported in this view by the Case of Saline County vs. Thorpe, Supra.

Now turning to your third question:

"then would they all come under the new law (Senate Bill #13) and have to have appraisers to go out and appraise the land etc.)"

In answer to this question it will follow that the position that we have taken on question 2, in holding that the county court could not take new bonds and sureties for the sole purpose of reducing the interest rate would necessarily prevent a situation as outlined in this question.

However, we might call attention to section 10386 Laws of Missouri, 1943, which reads as follows:

"When any moneys belonging to said funds shall be loaned by the County Court, and a mortgage is taken to secure payment thereof, the county court shall require the borrower and the parties who have signed the bond, as personal sureties, as above provided, to produce and furnish to the county court annually on the interest paying date of the loan or within thirty days thereafter, evidence showing that each of said sureties remain solvent, that they are resident householders of the county, and own property of the value of an amount equal to the amount due on the loan, in addition to all the debts for which said sureties are liable, and in addition to all property owned by said sureties that is exempted from execution. If the borrower and sureties fail to furnish satisfactory evidence of the solvency of the sureties as herein provided, or if the borrower fails to provide and furnish other solvent sureties, of the qualifications herein provided, within ten days after an order to that effect shall have been made and served on the principal in the bond, the court shall proceed to enforce payment of both principal and interest due, as provided in this article."

It will be noted from the reading of the aforementioned section that the borrower and his sureties must annually on interest paying date or within thirty days thereafter, satisfy the county court of their solvency, and if the court is of the view that they are not, then the court shall proceed to enforce payment of both principal and interest due. It will be further noted, that this section uses the word "shall" and it is our view that through the use of the word "shall" the statutes makes it mandatory upon the county court to proceed to enforce payment where they find that the borrower and sureties are not in a state of solvency. For it was said by the court in the Case of State ex rel. McKittrick vs. Wymore, 119 S. W. (2d) 941, 1.c. 944:

"* * * On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.* * *"

November 10, 1943

In Ballentine's Law Dictionary we find the following approved definition of the word "shall":

"The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. And so, the word 'shall' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction. But, if any right to anyone depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely. See *Montgomery v. Henry*, 144 Ala. 629, 1 L.R.A. (N.S.) 656, 658, 39 South Rep. 507."

It is our view that the statement in your letter that many of the bondsmen could not qualify under the new law will be of no avail if section 10386 Laws of Missouri 1943, applies to the present borrowers of school funds and their sureties and in this connection we call attention to section 10386 R. S. Mo. 1939, which section was re-enacted and is now section 10386 Laws of Missouri 1943, heretofore set out verbatim. We shall, for the purpose of comparison, set out verbatim, section 10386 R. S. Mo. 1939:

"The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. If such additional security be not given within ten days after an order to that effect shall be made, and served on the principal in the bond, and in all cases of default in the payment of interest, the court shall proceed to enforce payment of both principal and interest by writ, or in a summary manner, as provided in this chapter."

It is our view that section 10386 R. S. Mo. 1939, as well as the re-enacted section 10386 Laws of Missouri 1943, are procedural in character. Therefore, section 10386 Laws of Missouri 1943 is fully applicable to outstanding school fund mortgage loans as well as to new school fund mortgage loans made after said section became effective. The general rule laid down governing the effect of a statute which is procedural in character is laid down in the Case of *State ex rel. Midwest Pipe and Supply Company et al, vs. Haid et al*, 52, S. W. (2d) 183, 1.c. 186, wherein the court said:

November 10, 1943

"* * *It is a well-settled rule that, if before final decision in a case a new statute as to procedure goes into effect, it must from that time govern and regulate the proceedings. Clark v. Railroad, 219 Mo. 524, 118 S. W. 40. And a like result is produced by a change in the construction of a statute relating to procedure by a court of last resort.* * *"

CONCLUSION

1) In view of the fact that the statutory authority to receive money payments for principal and interest paid by a borrower on school fund bonds is placed upon the county treasurer to so receive, it is the opinion of this Department that a county clerk and his sureties are not liable on his official bond for such moneys for it is not part of his duties to receive the same.

2) It is the opinion of this department that a county court does not have authority to allow a borrower to execute new school fund bonds with the same sureties, and to execute a new mortgage covering the same land as described in the original mortgage where such new bonds and mortgages are taken by the county court for the sole purpose of allowing the borrower to reduce the interest rate that he was originally obligated to pay. Such act would be a mere subterfuge.

3) It is the opinion of this Department that section 10386 Laws of Missouri 1943, which is a re-enactment of section 10386 R. S. Mo. 1939, is procedural in character and therefore, applies to school fund mortgage loans both prior and subsequent to the enactment of said section.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

BRC:ir

COUNTY CLERK: It is the duty of the county clerk to add up the figures showing the amount of tax in the proper columns of an assessor's book, and the aggregate amount in each column shall be noted on each page.

December 8, 1943

12/21
FILED

62

Honorable Jesse A. Mitchell
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Judge Mitchell:

The Attorney General wishes to acknowledge receipt of your letter of December 3, 1943, in which you request an opinion of this department. This opinion request is as follows:

"Will you kindly furnish this Commission an opinion on the following matter:

"Is it the duty of the County Assessor or the County Clerk to add the Assessor's Book and place the totals of each class of property in the proper class on the book?

"Should each page in the Assessor's Book carry a total or will the grand total of all the property of a certain class meet the statutory requirement?

"The subject matter of this controversy is contained in Chapter 74, Section 10,990 R. S. 1939.

"Some or all county officials are at variance concerning whose duty it is to make these additions and enter these totals and they have asked us for a decision.

"We will appreciate same at your convenience."

December 8, 1943

On April 21, 1938, this department issued an opinion written by Tyre W. Burton, an Assistant, in which the first question relative to whose duty it is to place the totals of each class of property in the proper column on the book is taken up and considered. Consequently, we are attaching to this opinion a copy of Mr. Burton's opinion, which we feel will answer your first question.

The second question which you ask is as to whether each page in the assessor's book should carry a total or would the grand total of all of the property of a certain class meet the statutory requirement.

In answer to this question, we wish to cite you a portion of Section 10995, R. S. Missouri, 1939, entitled "Arrangement of assessor's book." In view of the fact that this statute is rather lengthy, we will only cite that part which is relevant to the question under consideration. Such portion of this statute provides the following:

" * * * The county clerk shall add up the figures showing the amount of such tax, in the proper columns, and the aggregate amount in each column shall be noted on each page. * * * "

We feel it is clear from the provisions of this statute that it is the duty of the county clerk to add the figures showing the amount of tax in the proper columns in the assessor's book, and that the aggregate in each column shall be noted on each page. We fail to find where this exact question has been passed on by the courts of this state, and therefore are only able to cite you to this particular section of the statute, which we feel is very clear.

CONCLUSION

It is, therefore, the opinion of this department that each page in the assessor's book shall carry a total

Honorable Jesse A. Mitchell -3-

December 8, 1943

of all of the property of a certain class or in one column.

Respectfully submitted

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

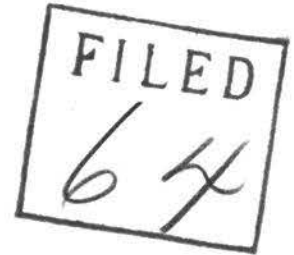
ROY McKITTRICK
Attorney General

JSP:HR

CRIMINAL LAW: One who has been previously convicted
of a felony is not eligible to a parole
PAROLE: under Section 4201 R. S. Missouri, 1939.

April 12, 1943

Honorable Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of April 8, 1943, which reads as follows:

"Would appreciate opinion on the
following question.

"Assuming that one has been pre-
viously convicted of a felony and
is convicted again for a felony,
but the second time instead of be-
ing sentenced to the penitentiary
is only sentenced for a jail sen-
tence, is this man eligible for a
parole under Section 4201, R. S.,
1939?"

Section 4199 R. S. Missouri, 1939, reads as fol-
lows:

"The circuit and criminal courts
of this state, the court of crimi-
nal correction of the city of St.
Louis and boards of parole created
to serve any such court or courts
shall have power, as hereinafter
provided, to parole persons con-
victed of a violation of the crimi-
nal laws of this state."

April 12, 1943

Under this section the circuit judge has the power of parole and it does not mention that it applies to felonies only.

Section 4201 R. S. Missouri, 1939, reads as follows:

"When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

Under this section a person can only be eligible to be paroled who has not previously been convicted of a felony.

Under the facts stated in your request you say that you are assuming that a person has been previously convicted of a felony, and under the conviction has only been sentenced to a jail sentence. The language set out in Section 4201, supra, is unambiguous and needs no construction. Where the language of a statute is plain and unambiguous it may not be construed, but must be given effect as written. (St. Louis Amusement Co., v. St. Louis County, 147 S. W. (2d) 667, 347 Mo. 456.)

Honorable Mark Morris

(3)

April 12, 1943

CONCLUSION

It is, therefore, the opinion of this department that where one has been convicted of a felony and is again convicted, but the second time, instead of being sentenced to the penitentiary is only sentenced to a jail sentence, he is not eligible for a parole under Section 4201 R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

TAXATION:

In counties duties and fees of township collectors and assessors with respect to income tax returns filed during the term of office but on which no assessment was made prior to the expiration of their term.

April 21, 1943

Mr. Bert E. Morgan
Clerk of the County Court
Daviess County
Gallatin, Missouri



Dear Mr. Morgan:

This will acknowledge receipt of your letter of April 1, 1943, as follows:

"Our county has Township organization.

"Since the State extended the time for filing state incomes, which assessor should list and file the State Income Assessments? Should it be the assessor in office before the election of township officers on March 30, 1943, or the assessor elected on that date?

"Which collector should do the collecting, the one elected on March 30?

"In case the assessors do not list or have any part in the work, are they entitled to a fee?"

Under Section 11354 R. S. Mo., 1939, state income tax returns are required to be filed with the assessor on or before the fifteenth day of March of each year. Under Section 11369 R. S. Mo., 1939, the assessor in certain cases is authorized to extend this period of

Mr. Bert E. Morgan

-2-

April 21, 1943

time not to exceed thirty days. We have been informed that the State Auditor has extended the time for filing income tax returns until April 15, 1943. Such extensions in cases of counties under township organization cause a return filed after March thirtieth to be filed with the new assessor elected on March thirtieth, in the year, 1943.

Under Section 11357 R. S. Mo., 1939, on tax returns filed March fifteenth, it is the duty of the assessor to certify the amount of taxable income involved to the county clerk not later than April fifteenth. Thereafter, it is the duty of the county clerk to compute the tax due and enter said amount on a tax book and deliver said book to the collector not later than May first.

Within thirty days after the books are delivered to the collector it is that officer's duty to affect collection. Where, under the extension of time granted, the taxpayer does not file his return until after April fifteenth, the assessor makes the assessment on or before the fifteenth day of the month following the filing of the return and certifies that fact to the county clerk, who, in turn, computes the tax, enters the same in a tax book and delivers said book to the collector.

From the above resumé it appears that the township assessor in office prior to March thirtieth will have performed certain duties relative to the tax returns filed on or before March fifteenth. He also, if he acted with reasonable promptness, will have performed certain duties with respect to tax returns filed after March fifteenth and before March thirtieth under the extension of time granted.

Your first question seems to contemplate that the assessor in office prior to March thirtieth has not performed any function with respect to the tax returns filed to him prior to March thirtieth. If this is true, he now being out of office, there is no function which he can perform and all acts yet required in connection with tax returns filed on or before the expiration of his term must be performed by the newly elected assessor.

The same rule would apply to your question relative to which collector should collect the tax. From the resume above outlined it is possible that by prompt action on the part of the assessor and the county clerk the tax books might be in the hands of the township collector before March thirtieth, and in that event the incumbent in office prior to that date would have the duty of collecting the tax assessed up until the time his term of office expired and his successor qualified. After the last mentioned date, a newly elected collector would be the one to affect the collection of income taxes still shown to be due and unpaid in the taxbooks.

Your last question concerns the compensation of the assessor who does not list or have any part in the work connected with assessing income tax. Section 11364 R. S. Mo., 1939, is as follows:

"Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing

and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state." (underscoring ours)

In *Westberg v. the City of Kansas*, 64 Mo. 493, 502, it is said in connection with officers that "salary and perquisites are the reward of express or implied services". Such rule is applicable here, especially in view of the fact that Section 11364, *supra*, speaks of the assessor's compensation in connection with "work performed".

Further, in *Throop's Public Officers*, Section 473, it is stated:

"As a general rule, an officer is entitled to his official compensation, only for the time during which he was the incumbent of the office.
* * * * *

and in Section 474, it is stated:

"An officer's compensation ends, when his term of office ends, whether that event occurs by the expiration of time, or by death, removal, or resignation. * * * * *

Mr. Bert E. Morgan

-5-

April 21, 1943

In view of the foregoing, we are of the opinion that the assessor who does not list or perform any of the functions required of him in connection with the income tax return filed with him during the term of his office is not entitled to any fees granted to compensate him for the performance of those duties.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:FS

SCHOOLS: (1) Prosecuting attorney to prepare the papers necessary in the loaning of money from county school fund.
(2) Duty of county clerk to see that such papers are properly recorded.

May 11, 1943



Mr. Bert E. Morgan
County Clerk
Daviness County
Gallatin, Missouri

The Attorney-General wishes to acknowledge receipt of your letter of May 6th requesting an opinion of this Department. Your letter of request reads as follows:

"I would like to know the responsibilities which belong to the County Clerk with reference to the School Fund Money, especially the loans which are made.

"Who should make out the papers for the loan, see that they are properly recorded and have them complete for filing?"

Your request, under our interpretation, includes two questions; first, who shall make out and prepare the necessary papers for a school fund loan, and, second, whose duty shall it be to see that such papers or forms are properly recorded and completed for filing.

Considering your first question we wish to cite you to Section 12944, R. S. Mo. 1939, which provides the following:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county

May 11, 1943

court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

As can be seen from the above statute, the prosecuting attorney shall represent his county in all matters of law and shall "draw all contracts relating to the business of the county." There can be no question that the preparation of the forms for a school fund loan is a contract relating to the business of the county. Therefore, it is the opinion of this department that this particular duty rests upon the prosecuting attorney under the provisions of the statute set out above.

It is with more difficulty that we seek an answer to your second question, since, unlike your first question, there is no provision of the statutes which provides whose duty it is to see that the necessary documents in the execution of a school fund loan are completed and properly recorded. In order to reach the correct solution to this query, we feel it requires a study of the general duties of the county clerks of the various counties in this State. But first we will cite you to the section of the statute which empowers the county court to manage the School Fund monies and to make School Fund Loans. This section is Section 10376, R. S. No. 1939, and prescribes as follows:

May 11, 1943

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Of course, the county court is a court of record in the State of Missouri, and the officer having custody, charge and control of the records of such court, and having the duty of keeping of such records, is the county clerk. It is common knowledge that he waits upon the county court and either he or his deputies keep the minutes of the meetings of the county court.

Your attention also should be called to Section 13295, R. S. Mo. 1939. This section of the statutes deals generally with the duties of the clerks of all courts of record, which, of course, includes the county clerks of the various counties. The provisions of such section are as follows:

"Every clerk shall record the judgments, rules, orders and other proceedings of

May 11, 1943

the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same: Provided, that where the clerk of the circuit court is a party, plaintiff or defendant (whether singly or jointly with others) to a suit or action, the writ of summons and all other process shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said latter named clerk shall, on the trial of said cause, act as temporary clerk of the circuit court and otherwise perform in said cause all the duties of the circuit court clerk."

For the purposes of this inquiry we will further cite you Section 13823, R. S. Mo. 1939, which refers to the duties of the county clerk relative to the keeping of accounts due the county which are payable to the treasury of the county. Due to the length of such statute, we will only quote the second subsection which is the part pertinent to our instant problem. Such provision is as follows:

"* * *; second, to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; * * *"

From the statutory provisions cited above we think that the first step in the loaning of money from the county school funds, is the preparation of the necessary documents or papers by the prosecuting attorney of the county. After such preparation and the signing of all such papers by the proper party or parties, the forms should be presented to the county court for their approval. We think that the clause in

May 11, 1943

section 10376, supra, which states, "to diligently collect, preserve and securely invest" the school fund moneys, places upon the county court the duty to inspect the completed forms and to approve the bonds. If and when this is done, it is our opinion that it then becomes the duty of the county clerk, as the ministerial officer of the county court, to see that the papers involved are properly recorded. It might be argued that this should be the duty of the county court itself, under the admonition given in Section 10376, supra. However, we feel that this ministerial duty can and should be delegated to the county clerk, since by statutes he is charged with keeping the records of such loans, and is the officer required to conduct the many ministerial acts connected with the action of the county court.

Conclusion

Therefore, it is the opinion of this department that the preparation of the papers and documents necessary to the loaning of money from the county school fund, is the duty of the prosecuting attorney in the county where the school fund loan is to be made.

It is further the opinion of this department, that it is the duty of the county clerk, as the ministerial officer of the county court, to see that the deed of trust and other necessary papers, if any, are properly recorded.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

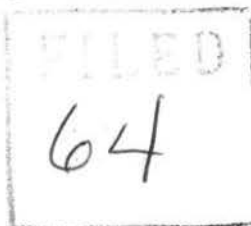
JSP:EG

House Bill No. 20:

Marriage license application is not required to be presented in person by applicants for licenses.

June 4, 1943

Hon. Mark Morris
Prosecuting Attorney
Pike County
Bowling Green, Missouri



Filed 64

Dear Mr. Morris:

Under date of June 1, 1943, you wrote this office requesting an opinion as follows:

"Would appreciate opinion on the following question:

"In regard to House Bill #20, recently passed by the 62nd General Assembly, would like to know if the application for the marriage licenses can be mailed in to the Recorder's Office or must be applied for personally. In other words, can the application be made out before a Notary Public, say in the State of Illinois, and then mailed to the Recorder's office in Missouri and there stay 3 days before a license is issued?"

The answer to your request depends upon the interpretation of the word "present" as used in the following sentence taken from House Bill No. 20:

"Before applicants for a marriage license shall receive a license, and before the Recorder of Deeds shall be authorized to issue a license, the parties to the marriage must, at least three days before the date they desire such license to be issued, present an application for the license to the Recorder of Deeds."

The verb "present" has various meanings, a few of the definitions of the word from Webster's New International

Dictionary are as follows:

"To lay or put before a person for acceptance; to offer as a gift; to give or bestow formally; of things, to afford or furnish.

"To hand or pass over, esp. ceremoniously; to deliver.

"To lay before, or submit to, a person or body for consideration or action; as to present a memorial, petition, or indictment."

In numerous cases courts have had occasion to define the word. In matters pertaining to court procedure it has frequently been given a meaning which limits the word to a personal presentment. Illustrations of these definitions are the following brief extracts from the cases:

"Under code, 3528, providing that no action shall be brought against a county on an unliquidated demand, unless the same has been presented to the board of supervisors and payment demanded and refused, an unliquidated demand, such as a claim for personal injuries, must be in writing when its payment is demanded; the word 'present' being generally used when formal action is indicated. *Escher v. Carroll County*, 125 N. W. 810, 812, 146 Iowa 738."

"Under a contract provision, requiring claim for damages or statutory penalty provided by Rev. St. 1919, 10136, Mo. St. Ann. 4925, p. 2240, to be presented in writing within 60 days after telegram was filed for transmission, a mere notice of failure to deliver the telegram is insufficient; a 'presentation' of a 'claim' based thereon being necessary. *Davis v. Western Union Telegraph Co., Mo.*, 236 S. W. 407, 408."

In other instances the word has been given a more liberal interpretation as illustrated by the following cases:

"Acts Ala. 1903, p. 117, providing for change of a county seat, and requiring petition therefor to be 'presented to the Governor,' means that it must be

lodged with him or his official force in some formal manner, so as to become an official document. State ex rel. Brown v. Porter, 40 So. 144, 145, 145 Ala. 541."

"Within C.S. 1913, 853, requiring presentation to Secretary of State of petitions of aspirants for nomination at a primary election, presentation may be through the agency of postal or express facilities. Such presentation is sufficient if a delivery of such petitions is made by mail or express in the usual manner to some agent of the secretary of state authorized to receive mail or express within the time prescribed by the statute. Held, that delivery of petitions by an express company to the board of administration of the state of North Dakota was a delivery to the secretary of state through an agent authorized to receive the same, and therefore a 'presentation' within the meaning of that term as used in the statute. State v. Byrne, 209 N.W. 345, 346, 54 N.D. 274."

No case has been found defining the verb "present" as used in Section 3364 of House Bill No. 20 enacted by the 62nd General Assembly.

In the statutory rules for construing statutes, Section 655 R. S. Mo., 1939, the following clause is found:

" * * * First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * "

The primary rule for construction of statutes is to ascertain the lawmakers intent, from words used, if possible, give language thereof, honestly and faithfully, its plain and rational meaning and promote its objects. Wallace v. Woods, 102 S. W. (2d) 91, 340 Mo. 452; Artiphone Corp. v. Coale, 133 S. W. (2d) 343; Cummins v. Kansas City Public Service Company, 66 S. W. (2d) 920.

June 4, 1943

No record is kept of the debates on bills in the House of Representatives which could be consulted to ascertain the intention of the Legislature. However, House Bill No. 20 was introduced and sponsored by the Honorable R. H. Ridenhour, Representative from Osage County. In an interview with Mr. Ridenhour he stated that it was not the intention that the bill should require an application for a marriage license to be personally presented; that an amendment to the bill was offered which would have required personal presentment by both parties desiring to be married; that the proposed amendment was defeated after debate on the floor of the House and that in his argument against the amendment he stated it was not his intention that the bill should require a personal presentation of the application by the applicants for license.

This bit of history, in connection with the passage of the act, clearly shows the intention of the Legislature.

The definitions in the dictionary and some of the cases uphold the conclusion.

CONCLUSION

An application for marriage license under the provisions of Section 3364 of House Bill No. 20, enacted by the 62nd General Assembly, need not be personally presented to the Recorder of Deeds by the persons desiring to procure the license to marry. It may be mailed or sent by messenger and if properly executed and shows the persons qualified to contract matrimony, the Recorder of Deeds may issue the license.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTICK
Attorney General

WOJ/mh

MARRIAGES: Ceremony - where performed.

July 30, 1943



Honorable Martin E. Morthland
Judge of the County Court
Macon County
Decatur, Illinois

Dear Sir:

We acknowledge receipt of your letter of July 28, 1943, requesting an opinion, which letter is as follows:

"Under the Selective Service Act, I was appointed Chairman of the Advisory Board for Macon County, Illinois. Recently, a Selectee one Joseph Hicks, of Maroa, Illinois, called at my office with an original Certificate of Marriage purporting to have been executed by Justice of the Peace George R. Hart of St. Louis County, Missouri. This Certificate indicated that said Justice of the Peace had married Joseph Hicks and Miss Lorraine Johnson on September 3, 1939.

"This Certificate apparently had been issued by the Recorder of Franklin County, Missouri, but the words Franklin County had been obliterated and above the obliteration appeared the designation, book, and page. It thus is evident that the License was issued by the Recorder of one County and the marriage was celebrated in another County.

"Mr. Hicks is desirous of making an allotment to his wife and a minor child born subsequent to the foregoing marriage but has received information that the government would not honor a Marriage Certificate with an obliteration as above described. The Clerk of this County telegraphed to the

Honorable Martin E. Morthland

(2) July 30, 1943

Recorder of St. Louis County, a photostatic copy of which is enclosed herewith, making inquiry about the recording of this marriage and received a reply, a photostatic copy of which is herewith enclosed, stating that there was no record of the same in St. Louis County. He then telegraphed the Recorder of Franklin County, a photostatic copy of which is herewith enclosed, inquiring about the recording of said marriage and the validity of the same, and received a reply, a photostatic copy of which is enclosed herewith, setting forth that said marriage is recorded in Franklin County and that said marriage is valid.

"We realize that the contract of marriage is governed by the laws of the respective States wherein said marriage is celebrated and are not familiar with the Laws of Missouri on this point. In Illinois, a marriage must be celebrated in the County where the license is issued.

"I, therefore, request you to give me an opinion with reference to the validity of the foregoing marriage celebrated by Justice of the Peace, George R. Hart, at St. Louis County on September 3, 1939."

Section 3363 R. S. Missouri, 1939, providing by whom marriages may be solemnized, is as follows:

"Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

person authorized under the laws of this state, to solemnize marriage between A B of _____, county of _____ and state of _____, who is _____ the age of twenty-one years, and C D of _____, in the county of _____, state of _____, who is _____ the age of eighteen years.

"If the man is under twenty-one or the woman under eighteen, add the followin:

"The father or mother or guardian, as the case may be, of the said A B or C D (A B or C D, as the case may require), has given his or her assent to the said marriage.

"Witness my hand as recorder, with the seal of office hereto affixed, at my office, in _____, the _____ day of _____, 19____. _____, recorder.

"On which said license the person solemnizing the marriage shall, within ninety days after the issuing thereof, make as near as may be the following return, and return such license to the officer issuing the same:

"State of Missouri,)
 ss.
County of _____.)

"This is to certify that the undersigned _____ did at _____ in said county, on the _____ day of _____ A. D. 19____, unite in marriage the above-named persons."

It will be noted that there is no provision in any of these statutes that direct: that the marriage must be performed in the county in which the marriage license is issued. It will also be noted that Section 3363, supra, provides that any judge of a court of record, or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who

Honorable Martin E. Morthland

(5)

July 30, 1943

is a resident of and a pastor of any church in this State may solemnize marriages. The prescribed form of license contained in Section 3365, supra, authorizes any judge, justice of the peace, licensed or ordained preacher of the gospel or other person authorized under the laws of this State to solemnize marriages between A B etc. It has been a common practice since these statutes became the law of this State, for marriage licenses to be obtained in one county and the ceremony performed in another. The legality of this procedure apparently has never been questioned, because we are unable to find a decision of any court involving this question.

CONCLUSION

It is, therefore, the opinion of this department, that a marriage ceremony may be performed in a county other than the county in which the marriage license was issued.

Respectfully submitted

LEO A. POLITTE
Assistant Attorney General

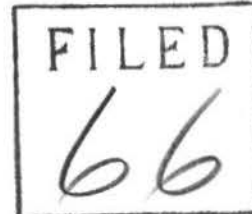
APPROVED BY:

ROY McKITTRICK
Attorney General

LAP:RW

PROSECUTING ATTORNEYS: It is not the duty of the prosecuting attorneys to defend charitable trusts on the part of the public.

February 18, 1943.



Hon. Ralph B. Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri

Dear Mr. Nevins:

The Attorney-General wishes to acknowledge receipt of your letter of February 16, 1943, in which you request an opinion from this Department. This opinion request, omitting caption and signature, is as follows:

"Is it the official duty of a Prosecuting Attorney to defend a suit to contest a will which contains a provision for setting up a trust fund for the crippled children of the county and naming the County Court as trustee of the fund? And if so, is he entitled to any compensation other than actual expenses?"

It appears that your question involves the consideration of a charitable trust and the question is as to whether or not the prosecuting attorney shall represent the public in matters of this kind and, if so, is he entitled to additional compensation.

In the case of *Dickey v. Volker*, 11 S. W. (2d) 278, the court held that it is the duty of the Attorney-General to bring all suits in matters of this kind. The court in speaking of this case, stated as follows:

"Appellant argues the texts do not assert a preclusive right in the attorney-general to sue. It is stated if no individuals are entitled to sue the attorney-general may

Feb. 18, 1943

sue. If other persons were entitled to sue it would have been so stated."

In 11 C. J., at page 368, we find the following:

"In suits for the enforcement of a public trust or charity, the attorney general is the proper suitor and he may file an information either of his own motion or on the relation of any party concerned."

In the later Missouri case of *Parsons v. Childs*, 136 S. W. (2d) 327, is cited approvingly the case of *Dickey v. Folker*, supra.

We feel that in view of the fact that the Attorney-General is the only officer authorized to bring suits in matters of this kind, in case a suit arises against such charitable trust that he would be the proper officer to defend the public's interest in such trust. Under such reasoning, of course the prosecuting attorneys of the various counties would be unable to prosecute or defend cases of this type.

Therefore, it is the opinion of this Department that it is not the official duty of the Prosecuting Attorney to defend a suit to contest a will which contains a provision for setting up a trust fund for the crippled children of the county, wherein the county court is named as trustee of the fund.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

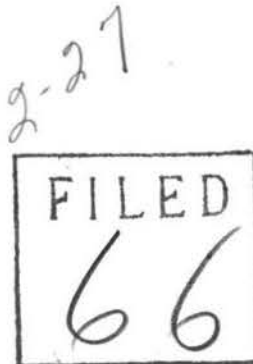
APPROVED:

ROY McKITTRICK
Attorney-General

PURCHASING AGENT: Permanent Seat of Government
shall purchase supplies to be
LEGISLATURE: used on third and fourth floors
of Capitol Building.

February 24, 1943

Mr. Leonard E. Newton
Chief Clerk
Missouri House of Representatives
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of February 19, 1943, which contains the following request for an opinion:

"It will be greatly appreciated, if you will furnish me an opinion on the following matter:

"Chapter 110, Article 30 of the Revised Statutes of Missouri, 1939, sets up a committee on Legislative Quarters and Library, establishing a permanent joint committee of the General Assembly. This committee has charge of the third and fourth floor of the Capitol Building.

"There has arisen a question as to who should purchase the supplies to be used on these floors. These supplies have been purchased, heretofore, by the Permanent Seat of Government.

"I would like to have you advise me whether or not the Committee on Legislative Quarters and Library should purchase a part or all of these supplies, and if so, what fund can be used for the payment of the supplies. Could this payment be made from the contingent fund of the House."

Section 14737, Chapter 110, Article 2, Revised Statutes of Missouri, 1939, reads as follows:

"There is hereby established a permanent joint committee of the general assembly, to be known as the committee on legislative quarters and library, to be comprised of ten members of the senate and ten members of the house of representatives whose offices shall be located in the capitol building, Jefferson City, Missouri. The senate members of the committee shall be appointed by the president pro tem of the senate and the house members shall be appointed by the speaker of the house, and their appointments shall continue during their terms of office as members of the general assembly."

This section, which is the re-enacted Laws of 1939, page 503, establishes a permanent joint committee which appoints a librarian who serves as secretary to the committee on legislative quarters and library. Under this chapter the committee on legislative quarters and library has charge and custody of the offices of the members of the Senate and House of Representatives, and the other offices on the third and fourth floors of the State Capitol Building.

Section 14739 R. S. Missouri, 1939, of the same chapter, reads as follows:

"It shall be the duty of the committee on legislative quarters and library to have charge and control of the senate and house chambers of the state capitol building and all other space on the third and fourth floors of the state capitol building as originally designed by the architects for the use of the members and officers of the senate and house

of representatives, including bill rooms and file rooms, and the furniture, files and supplies therein, all of which shall be reserved for the permanent use of the members of the senate and the house of representatives."

Section 14740 R. S. Missouri, 1939, partially reads as follows:

" * * * These rooms, together with all other rooms on the senate side of the capitol building, shall be in direct charge and under the control of the custodian of the senate, who shall be considered the representative and employee of the committee on legislative quarters and library, and no use of any of said quarters other than by the senate or the members thereof shall be made, save and except with the written consent of the senator occupying said office room and upon order of the committee on legislative quarters and library."

Under the above partial section the custodian of the senate has direct charge and control of the offices of the senate and the other offices on the third and fourth floors of the State Capitol Building.

Section 14741 R. S. Missouri, 1939, contains the same clause as set out in Section 14740, supra, but also includes the offices of the house of representatives, where, in Section 14740, supra, the offices of the members of the senate are included.

Section 14746, R. S. Missouri, 1939, provides that the committee shall make rules and regulations for the care and maintenance of the senate and house chambers, and other rules connected with the legislature. It also

authorizes the committee to provide telephones in certain offices, and provide postage and provide certain books for the library. It does not contain any provision for the purchase of supplies to be used on the floors of the third and fourth floors of the Capitol Building.

Section 14748 R. S. Missouri, 1939, reads as follows:

"It shall be the duty of the custodian of the senate and the custodian of the house to mark all legislative furniture by stencils or otherwise so that it can be identified to inventory and protect said furniture. It shall be the duty of the commissioner of the permanent seat of government to cooperate with the custodians above designated and supply and furnish necessary janitor hire to keep the legislative quarters in good condition."

Under the above section the legislature saw fit to declare it the duty of the commissioner of the Permanent Seat of Government to cooperate with the custodians designated in the chapter, and supply and furnish necessary janitor hire to keep the legislative quarters in good condition. It can be implied under this section that since the commissioner of the Permanent Seat of Government is required to keep the legislative quarters of the government in good condition, then the purchase of supplies for such purpose must be made by the Permanent Seat of Government and not by the committee on legislative quarters and library.

In your request you inquire whether the committee on legislative quarters and library should purchase a part or all of these supplies and from which fund the payment could be made. Since we are holding that the Permanent Seat of Government should furnish the supplies to be used on the floors of the quarters set out in Chapter 110, Article 3, it will be unnecessary to pass upon this question. However, we call your attention to Section

14590, Chapter 105, which reads as follows:

"The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in chapter 120, R. S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

Section 14592, Chapter 105, (Revised Statutes of Missouri, 1939), partially reads as follows:

"No department shall make any purchase except through the purchasing agent as in this chapter provided.
* * * * *

CONCLUSION

It is, therefore, the opinion of this department that the supplies to be used on the offices of the Senate and House of Representatives, and other offices on the third and fourth floor of the Capitol Building that are connected with the legislature must be made by the Permanent Seat of Government through the purchasing agent.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

SCHOOL LOANS:) If requested by county court prosecuting
PROSECUTING ATTORNEY:) attorney should give written opinion on
title.

September 8, 1943

9-11



Honorable J. F. Newton
Presiding Judge
County Court, right County
Mansfield, Missouri

Dear Judge Newton:

Under date of September 4, 1943, you wrote this
office requesting an opinion as follows:

"Should the prosecuting attorney give
the court a written report after ex-
amining abstracts in connection with
the granting of school fund loans."

The statutes relating to the lending of school
funds are found in Article 2, Chapter 72, R. S. Mo. 1939.
Section 10378 gives to the county court jurisdiction over
township school funds. Section 10376 provides for the
capital school fund of the county and contains the following:

"It is hereby made the duty of the several
county courts of this state to diligently
collect, preserve and securely invest, at
the highest rate of interest that can be
obtained, not exceeding eight nor less than
four per cent per annum, on unencumbered
real estate security, worth at all times
at least double the sum loaned, and may,
in its discretion, require personal security
in addition thereto, the proceeds of all
moneys, stocks, bonds and other property
belonging to the county school fund; * * *"

Section 10384 of the same article and chapter pro-
vides as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; and no loan shall be made to any person other than an inhabitant of the same county, nor shall any person be accepted as security who is not at the time a resident householder therein, who does not own and is not assessed on property in an amount equal to that loaned, in addition to all the debts for which he is liable and property exempt from execution. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong, and shall specify the time when the principal is payable, rate of interest and the time when payable; that in default of payment of the interest, annually, or failure by principal in the bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and that all interest not punctually paid shall bear interest at the same rate of interest as the principal. But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

Attention is directed to the fact that these statutes require that the funds be loaned upon unencumbered real estate. The only way that the county court can be assured that the money is loaned upon unencumbered real estate, is by having the abstract of title examined by someone who is familiar with the law of real estate titles and conveyancing.

The prosecuting attorney is the legal advisor of the county court. Section 12944, R. S. Mo. 1939, provides as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto; Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

(Underscoring ours)

You will note that the prosecuting attorney has the specific statutory duty of furnishing opinions upon legal matters to the county court or any of the members thereof, and must report in writing if directed to do so.

Sept. 8, 1943

Conclusion.

If the county court requests a written report concerning the title of lands offered as security for school fund loans, it is the duty of the prosecuting attorney of the county to give to the court his opinion in writing.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:EG

COUNTY SINKING FUND:) County sinking funds may be invested
COUNTY CAPITAL SCHOOL FUND:) in United States bonds; capital school
funds cannot.

September 10, 1943



Hon. J. F. Newton
Presiding Judge
County Court, Wright County
Mansfield, Missouri

Dear Judge Newton:

Under date of September 4, 1943, you wrote this office requesting an opinion as follows:

"We have a bonded indebtedness here in this county of right, and have a sinking fund to take care of same, there is about \$8,000 in this fund and it is being paid in faster than needed to retire the bonds. Would the court be allowed to purchase war bonds with this fund?

"We have a surplus in the school fund of about \$10,000 and it is coming in faster than we can loan it since the first of the year.

"Would the court be allowed to use any of this fund to purchase war bonds?"

Your attention is directed to Sections 13776 and 13782, R. S. Mo. 1939, respectively:

"The several county courts of this state are hereby authorized and required to loan out any money in the hands of the treasurer of such county collected for the purpose of constituting a sinking fund for the payment of the principal of

any indebtedness incurred, for which bonds are outstanding, or collected to pay interest on the bonds of such county issued, and which has not been applied in the payment of such interest, in any case where such bonds are or may be in litigation, or the validity of which is at the time being contested by judicial proceedings, or bonds maturing at the highest rate of interest that can be obtained, not exceeding eight nor less than five per cent: Provided, that no loan shall, in case of loan or sinking fund, extend beyond the maturity of the indebtedness said sinking fund is provided for and intended to pay, but shall be due and payable a sufficient time before the maturity of said indebtedness to insure prompt payment thereof."

"In case the county court of any county, having such money as is referred to in the foregoing sections of this article, shall deem it best, such court, instead of loaning such money in the manner hereinbefore provided for, may invest the same either in purchasing, on the best terms obtainable, bonds of the United States or of the state of Missouri, said bonds to be held in trust for the fund or funds to which the money applied to their purchase belonged, and shall be so expressed in the public records of the county."

These two sections of the statute being in pari materia, relating to the same subject matter, should be construed together. State ex rel. Bank v. Davis, 284 S. W. 464, 1. c. 470:

"Sections 1177 and 1180 should be construed together and a meaning given to

each which will not destroy the other, if this can be done. Notwithstanding what was said in *State ex rel. v. Gantt*, supra, said sections of the statute should be held in *pari materia*. The general rule is thus laid down in 36 Cyc. 1147:

"Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature, or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments."

"This is the rule in Missouri. *Grimes v. Reynolds*, 184 Mo. 679, loc. cit. 688, 68 S. W. 588, 83 S. W. 1132."

Looking up the history of these two sections of the statute we find that they were both enacted at the same time, and as a part of the same bill, by the General Assembly of 1875, Laws of Missouri, 1875, p. 45. The act was approved February 19, 1875. What is now Section 13776 was originally Section 1 of the act. It has been amended several times with respect to the rate of interest which should be charged and the period for which loans could be made. What is now Section 13782 was Section 7 of the original act. The title of the act was:

"An Act to authorize the several county courts of this State to loan out and invest certain moneys."

The purpose of construing and interpreting statutes is to ascertain the intention of the Legislature in passing the act. Inasmuch as the Legislature was treating with the matter of investment of county funds, it is obvious that recognition was given to the fact that it might not always be possible to keep the funds invested in real estate securities and that the optional method of investing in United States bonds or bonds of the State of Missouri was provided in order that interest might not be lost due to real estate security being unavailable.

In regard to the investing of the capital school fund of the county in United States bonds, this is strictly prohibited by Section 10, Article XI of the Constitution of Missouri, which directs what form of security must be taken for loans made from the capital school fund. Said section provides:

"All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto."

Conclusion.

From the foregoing it is the conclusion of the writer that funds belonging to the sinking funds of the county may be invested by the county court, when it deems it advisable, in

Hon. J. F. Newton

-5-

Sept. 10, 1943

United States bonds and bonds of the State of Missouri until such funds are needed to meet the obligations for which the funds are collected. The capital school fund of the county cannot be invested in United States bonds.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WOJ:EG

DEPOSITORIES: A county cannot pay bonus or fee to
COUNTY DEPOSITORIES: county depositories for taking care
BANKS AND BANKING: of county funds.

May 13, 1943



Mr. Onie D. Newlon
Prosecuting Attorney
Ralls County, Missouri
New London, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of May 11th, 1943, in which you request the opinion of this department. Your letter of request is as follows:

"The Perry State Bank of Perry, Missouri, being the only bank in Ralls County, Missouri, has been by the County Court designated as the County Depository for all County funds.

"The Bank is willing to receive and handle all the County money, but refuse to give the Statutory Bond unless the County Court will agree to pay said bank a gross yearly fee of \$300.00 for handling all the County money. Banks in other counties are willing to receive the money, but refuse to give the statutory bond required of depositories, but offer to carry the money at no expense to the County, the same as the Perry State Bank. Of course, the sureties on the bonds of the County Treasurer and the County Collector will go off their bonds unless there is established a legal depository for said county funds.

"In view of all of these circumstances, we would like an opinion from you as to whether or not the County Court could audit

and allow a fee or charge in the sum of \$300.00 per year in favor of said Perry State Bank in payment of their services as such a legal depository for all county funds."

After stating the facts as set forth, you desire to have our opinion as to whether or not the County Court may legally pay the Perry State Bank, of Ralls County, Missouri, \$300 per year for their services as a legal depository for all of the county funds.

Under the provisions of our statutes, Article 9, Chapter 100, R. S. Mo. 1939, Sections 13846 to 13861, inclusive, there is set up a special procedure for the selection of the county depository, or depositaries.

Section 13846 provides in part that the county court at the May term in the odd years shall receive proposals from such banking corporations, associations and individual bankers, as may desire to be selected as depositaries of the funds of said county.

Section 13848 sets forth in detail how the various banking associations may proceed to submit their bids and the rate of interest that they will pay for the county funds. Under this section the depository is selected for a period of two years.

Section 13849 provides for the opening of the bids by the county court on the first day of the May term of the odd years.

Section 13850 provides that after the selection of the depository by the county court the selected depository shall give bond for the security of the funds.

Section 13852 sets forth a procedure where, in the event no bids are submitted, as provided in Section 13848, the county court shall have the power to deposit the county funds with any banking corporation, association or individual banker as the court may deem advisable, and at a rate of interest agreed upon to be paid by the depository, but not less than one and one-half per centum on the daily balances of such depository.

Section 13854 provides for the letting of portions of the county money not bid for by the various banking corporations or associations and provides for readvertisement and reletting of the funds of the county.

This brief summary of the procedure for the letting of the county funds presupposes a rate of interest of not less than one and one-half per cent for the use of the county money.

As is well known, after August 23rd, 1937, under the provisions of the Federal Reserve Act, Title 12 U. S. C. A., Sec. 371a, page 564, it is provided:

"No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand: * * * * *

Contemporaneous with the effective date of the Federal Act referred to above the General Assembly of Missouri enacted a statute which became effective September 6, 1937, and is now Section 7984, R. S. Mo. 1939, which provides that no bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposits of money, public or private, which are payable on demand, at a rate of interest in excess of the then rate of interest authorized by the laws of the United States of America or by regulations issued under authority of such law, to be paid on such deposit by member banks of the Federal Reserve system or by banks whose deposits are insured by the Federal Deposit Insurance Corporation. Therefore, it is unlawful for any bank (or trust company, Section 8064, R. S. Mo. 1939) to pay interest on public funds. And public funds, which include county funds, come within the provisions of the Federal and State statutes and banks are not permitted to pay interest on said funds.

After the enactment of the Federal law above referred to, and in 1937, the General Assembly of Missouri passed what is now Article 9, Chapter 39, Sections 8183 to 8188, inclusive, R. S. Mo. 1939, providing that the public funds of the various political subdivisions of the state, which include the public funds of counties, must be secured by the depository in the same manner as the State funds deposited by the

State Treasurer are secured, under the provisions of Articles 1 and 2, of Chapter 87 of the Revised Statutes of Missouri for the year 1939, and all amendments thereto. It is not necessary to set forth the procedure for the safeguarding of public funds under this act, for the reason that it is not essential to the determination of your question.

Section 8185, R. S. Mo. 1939, provides as follows:

"The various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds to the best bidder or bidders for the whole or any part of any of the public funds of the character referred to in Section 8183 shall be applicable only if and when, at the time of said advertisement and award, it shall be lawful for banking institutions to pay interest upon demand deposits, in which event such applicable statutory provisions shall be complied with; but if, at the time of the advertisement for bids or the receipt of bids or the award of funds, it shall be unlawful for depositary banks and trust companies to pay interest upon such demand deposits, the award or awards of such funds shall be made in each case, without bids and without requiring the payment of any bonus or interest, by the authority or authorities which are by statute empowered to make the awards of such funds upon bids."

It will be observed by the above quoted section that when it shall be unlawful for banks to pay interest upon demand deposits the depositary may be selected without bids and without requiring the payment of any bonus or interest.

Section 8186 provides that if no banking corporation, association or trust company shall be selected by the governing authorities they shall go outside the territorial limits and select a depositary which the authorities may deem the safest and most convenient depositary or depositaries for such public funds.

Since, under the present state of the law, banking corporations, associations and trust companies cannot pay interest on public funds, you now desire to know whether or not the County may pay the selected depository, or depositories, a bonus or fee for the handling of the county funds, and, in your case, the sum of \$300.00 per year. There being no authority of law to pay the bank in question for safeguarding and protecting the public funds if the County should make such payment it would be an unauthorized act.

CONCLUSION

It is, therefore, the opinion of this department that the County Court of Ralls County, Missouri, would have no authority to pay the bank in question the sum of \$300.00 annually to safeguard and protect the public funds of that county, and that, if such payment is made it would be without authority of law, and, therefore, an unauthorized act.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:CP

(SUPPLEMENTAL OPINION)

ELECTIONS: Same polling place may be used for both Constitutional Convention delegates election and municipal election.

March 3, 1943.

Hon. Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri



Dear Mr. Niedner:

The Attorney-General wishes to acknowledge receipt of your letter of February 26th in which you request an opinion relative to some questions regarding the election to be held to select delegates to the Constitutional Convention. There seem to be two questions which you wish answered: first, as to whether the judges and clerks who are selected to serve in the Constitutional Convention election, can also serve as judges in a municipal election; and, second, whether it is necessary that there be separate polling places for the Constitutional Convention election and for the municipal election.

In answer to your first question, we will say that this Department has furnished an opinion which holds that the judges and clerks to be used in the selection of delegates for the Constitutional Convention shall be separate from the judges and clerks which serve in any municipal election which is to be held on the same day. We base our opinion on the fact that the election of the delegates to the Constitutional Convention is not a function in any way of any municipal government, and neither is the selection of municipal officers in the different cities connected in any way with the procedure of selecting delegates to the Constitutional Convention. They are matters wholly divorced from each other and it is a mere coincidence that these two elections happened to be called for the same day.

We further base our opinion in this matter on the provisions of Section 11683, R. S. Mo., 1939, which provides as follows:

"Whenever an election shall be called to elect delegates to a constitutional convention or an election called for the purpose of ratifying a submitted new Constitution, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions were submitted at a general election; except, that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and the next highest number of votes for governor at the last general election: Provided, however, that in all cities and counties of this state where registration of voters is now or may be provided for by law, elections under the provisions of this section shall be held in accordance with the provisions of law now in effect, applicable to the holding of elections in said cities and counties, and the county committee of each political party which at the general election for governor held next preceding any special election to elect delegates to a constitutional convention or for ratification of a new Constitution, cast at least ten per cent of all the votes cast at such election for governor in such city and county, shall appoint three judges and one clerk outside of such city for election under the provisions of this section, and in all such cities the judges and clerks of elections regularly appointed or that may be hereafter appointed and commissioned for regular state and county elections shall act as judges and clerks of all special elections under the provisions of this section. All acts or parts

of acts inconsistent with the provisions of this act are hereby declared inapplicable to elections called for the purpose herein provided for."

It will be seen from reading this statute that there are a different number of judges and clerks to be used in an election of this kind than there is under any other election to be called under the general election laws of the State of Missouri, and it is the opinion of this Department that the judges and clerks to be used in the election called for the purpose of selecting delegates to the Constitutional Convention shall be used only for the purposes of that election.

In answer to your second question, we have searched the statutes and we do not find any provisions stating that the polling places for the Constitutional Convention delegate election shall be separate and apart from the polling places of any municipal election to be held on the same day. As will be noted from the section of the statute cited above, in cities and counties where the registration law is in force and effect, this election shall be conducted under such registration law. In view of the fact that you are operating under the provisions of such registration statutes, it will be necessary, of course, in the coming election for the selection of delegates, that you proceed under such statutes. It is apparent that under the circumstances, to-wit, that you have only one set of registration books, that if the polling places for the municipal election and the election for delegates are to be separate that it would be almost impossible to use the one set of registration books which you have. However, we see no reason why polling places for the municipal election and the election for the selection of delegates should not be held in the same place as long as the judges and clerks for the two elections are not the same.

Therefore, it is the opinion of this Department that the same polling places may be used in the municipal elections and the election for the selection of delegates to the Constitutional Convention.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

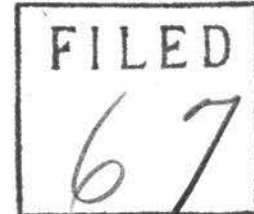
APPROVED:

ROY MCKITTERICK
Attorney-General

ELECTIONS: Persons must be registered to vote in annual school election in City of St. Charles, Missouri.

April 7, 1943.

4-21



Hon. Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Niedner:

The Attorney-General wishes to acknowledge receipt of your letter of April 6, 1943, in which you request an opinion of this office. Due to the length of the letter we will not set out your request in full but will merely state the question which you have asked in such request. The matter to be considered is,

Whether or not persons living within the city limits of the city of St. Charles, Missouri, shall be permitted to vote if they have not registered in such city.

The population of the city of St. Charles at the last Census was 10,803 persons, and it therefore will come under the provisions of Article 19, Chapter 76, R. S. Mo. 1939, entitled "Registration and Election in Cities of 10,000 and less than 30,000 Inhabitants." In such article Section 11937 provides as to what persons shall be eligible to be registered, in cities such as St. Charles, for the purpose of voting, and further provides that a voter shall not vote elsewhere than in the election precinct where his name is registered. The provisions of this section would imply that unless a person is registered he shall not be allowed to vote in any election " * * for all officers, state or municipal, made elective by the people, or at any other election or primary held in pursuance of the laws of the State; * * "

It is also provided in the aforesaid article, in Section 11956, that "All elections in such cities shall be conducted in all respects as provided in this article and subject to all the provisions of Chapter 76, Revised Statutes of the state of Missouri, 1939, entitled, 'elections,' so far as the same do not conflict with this article."

Section 10483, which is found in Chapter 72, R. S. Mo. 1939, relating to "Schools," provides for an election in any town, city or consolidated school district, and provides in part as follows:

"* * said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers * *"

As can be seen from the provision above, in those school districts located in cities and towns, and also in consolidated districts, as set out in Article 5, Chapter 72 of the Revised Statutes of Missouri for 1939, the school elections held annually shall be conducted in the same manner as the elections for state and county officers.

In view of the fact that in elections for state and county officers and all other elections to be held in the city of St. Charles, it becomes necessary by the statutes of the state that any person desiring to vote shall be registered in the manner provided for by the provisions cited above, and then may only vote in that district in which he is registered, it necessarily follows that in the annual school elections which are held in the city of St. Charles that in order for a person to vote it becomes necessary that he be registered, since the annual school elections in such city shall be conducted in the same manner as elections for county and state officers.

Conclusion

Therefore, it is the opinion of this Department that in order for a person to cast his ballot in the annual school election in St. Charles, Missouri, that it is necessary that

Hon. Robert V. Niedner

-3-

April 7, 1943

he be registered as provided by the registration laws relating to cities having a population of not less than 10,000 people nor more than 30,000 people.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

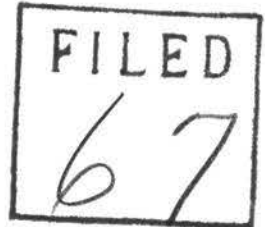
ROY MCKITTRICK
Attorney-General

JSP:EG

RECORDER: Recorder not to destroy original deeds and marriage licenses after they have been recorded. He must retain in his office -(only exception being chattel mortgages five years old.)

April 8, 1943

Honorable Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri



Dear Sir:

This will acknowledge receipt of your letter of April 3, 1943, requesting an opinion on the following matter:

Whether original deeds, marriage licenses, etc., remaining in the office of the recorder of deeds, after having been recorded, may be destroyed by the recorder.

The following sections are cited, and not set out in detail, for the purpose of putting before you the provisions in our statutes relating to the duties of the recorder of deeds.

Section 13161 R. S. Missouri, 1939, relates to the matters to be recorded under his duty as a recorder.

Sections 13162, 13163 and 13164 R. S. Missouri, 1939, provide for the manner and form, and how the records are to be kept in this office.

Section 13167 R. S. Missouri, 1939, requires a certificate on the instrument recorded, and in a subsequent paragraph this section will be quoted entirely.

Section 13183 and Section 13184 R. S. Missouri, 1939, are the penalty statutes imposing penalties for the neglect of duty of this officer.

Now turning to the statutes concerning marriage licenses, we find Section 3364 R. S. Missouri, 1939, states that licenses must be obtained.

Section 3365 R. S. Missouri, 1939, requires a recorder to issue the same.

April 8, 1943

Section 3366 R. S. Missouri, 1939, requires this officer to record marriage licenses and, under Section 13167, supra, is also required to certify same. Sections 3367 and 3369 R. S. Missouri, 1939, provide a penalty for failure to issue, record and certify marriage licenses.

Examining the statutes and authorities for the provisions relating to the description of instruments in the office of the recorder of deeds, we find the following:

Section 3490 R. S. Missouri, 1939, provides as follows:

"Every such mortgage or deed of trust, where the original or a copy shall have been filed, as herein provided, shall cease to be valid as against the mortgagor or the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the filing of the same, and the recorders of the several counties are hereby authorized to destroy any and all such mortgages remaining on file in their respective offices after the expiration of five years from the filing of the same: Provided, that when any such mortgage shall be destroyed, as herein provided, the recorder shall note such destruction and the date thereof upon his chattel mortgage register: Provided further, that this section shall apply only to chattel mortgages or encumbrances upon chattels, which are merely filed but are not recorded at length. As to chattel mortgages or encumbrances on chattels which are recorded at length in the recorder's office the limitation of the lien and validity thereof shall be governed by the general statutes of limitations pertaining to written instruments."

Section 13178 R. S. Missouri, 1939, provides for the retention of certain deeds and we quote that portion of the statute useful to our purpose. This portion reads

as follows:

"Whenever the recorder of deeds, or any other person acting as recorder of deeds, in any county in this state, shall record any instrument of writing affecting real estate, which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record, he shall retain such instrument of writing in his office, subject to the inspection of all parties interested, for one year next succeeding the time such instrument shall be recorded: * * * * *."

Further research and examination reveals that in Section 4598 R. S. Missouri, 1939, no original instrument may be destroyed and this statute of course applies not only to recorders of deeds, but to all persons. This section provides, as follows:

"If any person shall unlawfully, willfully and maliciously tear, cut, burn, or in any way whatever destroy any will, deed or other instrument of writing, the falsely making, altering, forging or counterfeiting of which is hereinbefore declared to be a punishable offense, he shall, on conviction, be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Turning now to the further duties of the recorder we find that at Section 13167, supra, the following mandatory duties are imposed upon this officer. Our examination now is directed to other authorities and decisions for the purpose of determining the intent of the legislature and the judiciary as to an expression of their ideas of the nature of this office. We quote from 53 C. J. p. 622, par. 38, which provides as follows:

"A public officer, by virtue of his office, is the legal custodian of all papers, books, and records pertaining to his office, and is responsible for their safekeeping and protection against alteration, injury, or mutilation. Correlative with that duty is his right to exercise a reasonable discretion in the care, management, and control of such records and their preservation. The law presumes that a public officer will properly perform this duty, * * * *."

Looking to other jurisdictions we find, in Lum v. McCarty, 39 N. J. Law Rep., l. c. 290, the court held:

" * * * The clerk is the lawful custodian of the records, and indexes thereof, and is responsible for safe keeping thereof. His powers over them are such as are necessary for their protection and preservation. To that end, he may make and enforce proper regulations consistent with the public right for the use of them * * * * *."

For a definition as to the nature of this office see 53 C. J. p. 1070, par. A, which reads as follows:

"A register of deeds is a public officer authorized and required by law to keep records in the manner directed by law, of instruments in writing, especially instruments affecting the title to real property. Such an officer is in some jurisdictions designated as a recorder of deeds, a county recorder, etc., and in other jurisdictions his duties are imposed upon other specific ministerial officers, such as county clerks, clerks of court, etc."

Honorable Robert V. Niedner

(5)

April 8, 1943

Concerning the filing and recording of instruments in his office we find in 53 C. J. 1072, the following expression:

"Generally, the duty of the register is to receive and file, or receive and record, as the case may be, such instruments as by law are entitled to be filed or recorded, and to file or record them in such manner as to serve all the purposes of the law, and whether the parties have made valid instruments is not his province to determine. * * * * *"

Occupying ourselves with the liabilities we find in 53 C. J. 1074, this expression, together with citation of two Missouri cases:

"A register of deeds is liable personally to the party aggrieved for the damages resulting from an omission to perform a duty imposed on him by law, or from a performance of such duty in a negligent manner. But it must appear that the damages resulted from the register's official default, and not from any fault or laches of the party damnified. Where a statute imposes civil liability for willful violation of the recording officer's duty he is not liable where it is shown that there was no such willful violation."

The two Missouri cases cited are Bishop v. Schneider, 46 Mo. 472 and State v. Green, 112 Mo. App. 108.

53 C. J. 1075, par. 20, provides:

"To Whom. The liability of a register for breach of official duty inures only in favor of the person to whom the duty

was owed and who was prejudiced by the breach thereof. A register who goes out of office without having recorded deeds for which he was prepaid is liable to an action by each person by whom a deed was filed."

A recorder of deeds has been declared to be a ministerial officer whose duty requires him to execute mandates lawfully issued by his superiors. This authority may be found in Bouvier's Law Dictionary; Mechem on Public Officers, par. 733, and Luther v. Banks, 111 Ga. 374.

Thus far in our examination, in respect to original instruments such as deeds and marriage licenses at the time they are offered for recording, filing and indexing, it would seem that the duty of the recorder is purely ministerial. That is, he is to execute an act in the prescribed manner in obedience to the statutes or the mandates of legal authority, without regard to the exercise of his judgment as to the propriety of his acts.

Observing the Missouri decisions touching upon this point, for your information and guidance we cite, Williams v. Elliott, 76 Mo. App. 8, Edwards v. Ferguson, 73 Mo. 686, Ewing v. Vernon County, 216 Mo. 681, 1. c. 694. We think this latter case is of sufficient importance to quote that portion of a decision directly bearing upon the question under consideration. This portion reads as follows:

" * * * The evidence further discloses in this case that the county furnished no vault room to keep and preserve recorded instruments. In this condition of things, plaintiff returned them by mail after recording. He seems to have made a distinction between non-residents and residents of the county. As to non-residents he presumably required postage in advance of redelivery by mail. It is stoutly argued that it was not his statutory

duty to return recorded instruments at all, even when requested to do so. It is shrewdly (and sourly) suggested in oral argument that if he obliged the general public by the courtesy of the return of a recorded instrument, such act was self-serving and must be referred to future political ambition in currying favor with voters. He is likened to a sower, who sows that he may reap at seed time. But we shall not take this view of it. The legal duty of an officer is to be obliging and courteous. The general welfare of the public demands the application of the idea that noblesse oblige. Not only so, but by section 9069 he is required to deliver the deed and its certificate of record, when recorded, 'to the party or his order.' By section 9089 he is required in certain instances to transmit deeds from one county to another. * * * * *

A research now leads us to believe that the liability of the recorder in the instance of original documents in his office after same have been recorded has a three-fold aspect. His responsibilities under the duties imposed on him place him under these obligations:

1. Duty to the Public.

The obligation arising under his official duty as imposed by law, governed also by the common law, and tempered by judicial decisions place him in a position of a ministerial officer. As such, his duties are prescribed by law. He is compelled to act in a prescribed manner, without regard to the exercise of his own judgment as to the propriety of his acts.

2. The Duty to the County.

He is under a contractual obligation conditioned on his bond, in which he expressly contracts to perform his duties. His contract is conditioned upon the faithful performance of his duties enjoined on him as recorder and for the delivery of county property to his successor. Under this contract he agrees to perform certain acts as defined in the statutes unconditionally.

3. Duty to the Individual.

The recorder is responsible to the individual who offers a deed or marriage license for filing, recording indexing and certifying. He has under his care, custody and control, for the purpose of such recording, filing indexing and certifying original instruments, the property of others. A deed or a marriage license in such an instance is property, - a chattel - and under the duties imposed on him the recorder is required to return this chattel "to the party or to his order."

Without being tedious but to cover the subject completely and faithfully it will be necessary to refer to other cases on this subject. We have previously quoted *Ewing v. Vernon County*, 216 Mo. 1. c. 694, and Section 13167 R. S. Missouri, 1939, and now observe the decision in *York County v. Watson*, 15 S. Car. 1. c. 8, in which the court said:

"It was said in the case of *United States v. Thomas*, 15 Wall. 344: 'The basis of the common law rule is founded on the doctrine of bailment. A public officer having property in his custody, in his official capacity, is a bailee, and the rules which grow out of that relation are held to govern the case.' And in *Boyden v. United States*, where the officer was held responsible, this doctrine was not denied. On the contrary, it is said in that case: 'The contract of bailment implies no more, except in the case of common carriers, than ordinary care; and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. * * * * *

Further research along this same line shows the following:

46 Corpus Juris, 1035, par. 301, which reads as follows:

" * * * Public officials take their offices cum onere with all responsibilities attached, and in accepting office impliedly contract to perform the duties thereof. As a general rule the duties imposed by law on public officers are functions and attributes of the office, and not of the officer; they remain, although the incumbent dies or is changed, and are to be performed by the incumbent, although they may have been left undone by the predecessor."

And 46 Corpus Juris, 1044, par. 329, which reads as follows:

"Where a ministerial duty is owing solely to the public, an individual has no right of action against the officer for a breach thereof, but where, although he may owe a duty to the public, he in addition owes a ministerial duty to an individual, as where he is absolutely bound to render a service for compensation in fees or salary, he may be liable in damages for acts of misfeasance or nonfeasance to an individual specially injured. * * * * *"

CONCLUSION

From the above and foregoing, the conclusion at which this department has arrived may be stated as follows:

April 8, 1943

The statutes now in effect and the opinions expressed by our courts reflect the intent of the legislature and the interpretation of those laws by our judiciary. Thorough and painstaking search of the statutes and decisions fail to disclose any authority, express or implied, whereby a recorder of deeds may destroy an original document in his office, other than those mortgages covered in Section 3490 R. S. Missouri, 1939. In addition, there is another reason why deeds, marriage licenses and other original documents remaining in the office of the recorder of deeds may not be destroyed, besides the interest of the general public in these documents, there is an individual interest.

Strictly speaking these documents (the originals after having been recorded) are chattels and as such are property. They belong to the person who offers them for recording, filing, indexing etc. Certainly an officer is without authority to destroy the property of another.

The object and purpose of recording deeds, marriage licenses, documents, etc., is to prevent fraud in certain transactions involving title to real estate and marriages by affording an accurate, certain and public record of such dealings. As a ministerial officer the recorder of deeds is required by Section 13167 R. S. Missouri, 1939, "to deliver to the party or his order original documents in his office after same have been recorded by him."

APPROVED BY:

Respectfully submitted

ROY MCKITTRICK
Attorney General

L. I. MORRIS
Assistant Attorney General

LIM:RW

Sheriffs:

CRIMINAL COSTS: Sheriff who is Superintendent of Public Welfare not entitled to mileage for investigating criminals.

July 21, 1943

7/27



Mr. Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

We are in receipt of your letter of July 9, 1943, in which you request an opinion from this department, which reads as follows:

"The Sheriff of St. Charles County is the duly appointed Superintendent of Public Welfare in the County under Court order fixing a small monthly salary and allowing him 5¢ per mile for traveling in the course of his duty as such County Superintendent of Public Welfare. The question has been raised whether or not he may bill the County Court for mileage at 5¢ per mile for investigating and examining circumstances which may lead to the apprehension of criminals, i.e., does Section 9727 of the Revised Statutes of Missouri for 1939 authorize the County Court to pay the County Superintendent of Public Welfare 5¢ per mile for investigation of complaints that crimes have been committed which may or may not result in arrests upon the basis of the above appointment including the mileage order."

Under the facts in your request the investigation by the sheriff is for the apprehension of criminals and the five cents per mile allowed by the county court can be considered an indirect way of allowing criminal fees.

Section 13413, R. S. Mo. 1939, sets out the specific fees of a sheriff in criminal actions.

Section 13414, R. S. Mo. 1939, declares the amount allowed for mileage in criminal cases and in all proceedings for contempt or attachment.

Section 13415, R. S. Mo. 1939, reads as follows:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

Under the above section no sheriff shall be allowed any fees except those specifically set out in Sections 13413 and 13414. In reading Sections 13413 and 13414, we find no allowance of mileage to a sheriff who is investigating a crime for the purpose of apprehending a criminal.

Where no mileage or fee is set out specifically by statute, then the sheriff performs the duties gratuitously and, if the sheriff claims such a fee he must point out the statute allowing him fees or mileage. It was so held in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, Par. 5-7, where the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656."

Under Section 9720 of Chapter 56, Article 11, R. S. Mo. 1939, the county court shall fix the salary of the County Superintendent of Public Welfare and of his assistants in its county. The county court under that section could allow mileage to the Superintendent of Public Welfare, who, in your request, is the Sheriff, providing that the duties he performs are the duties set out in Chapter 56, Article 11. Under Section 9727 of that article it specifically states and sets out the duties of the County Superintendent of Public Welfare. Under that section we find no provision for the Superintendent of Public Welfare to investigate crimes for the purpose of apprehending criminals.

The county court could allow mileage to the Superintendent of Public Welfare for performing the duties as set out in Section 9727, R. S. Mo. 1939. Section 9727, R. S. Mo. 1939, reads as follows:

"It shall be the duty of the county superintendent of public welfare to investigate the conditions of living among the poor, sick and delinquent in the county and to examine thoroughly into causes of crime and poverty in the county and to make recommendations from time to time to the state board of charities and corrections, and to proper local authorities as to any change in conditions or in legislation necessary to prevent or reduce poverty, crime or distress in the state. The superintendent of public welfare and his assistants may be deputed as agents of the state bureau of labor statistics and when they are so deputed as agents of the state bureau of labor statistics, they shall exercise all the authority to make investigations which is granted the state bureau of labor statistics."

CONCLUSION

It is, therefore, the opinion of this department that the county court of St. Charles County cannot allow the Sheriff of St. Charles County mileage at five cents per mile for travel-

ing in the course of his duty as County Superintendent of Public Welfare, when the Sheriff is not performing that duty but is investigating and examining circumstances which may lead to the apprehension of criminals.

It is, therefore, our opinion that the Sheriff of St. Charles County cannot indirectly receive mileage for investigating criminal cases, since this is directly forbidden by Section 13415, R. S. Mo. 1939.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WJB:CP

MUNICIPAL CORPORATIONS: Cities of the third class may not expend money from the general revenue fund for the purpose of obtaining a "City Plan."

September 27, 1943

10/16



Honorable Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Niedner:

Your letter of September 17th requesting an opinion from this Department has been received by the Attorney-General and has been assigned to me for consideration. This opinion request, omitting caption and signature, is as follows:

"I should like to have your opinion concerning the following matter.

"It has long been the practice in the City and County of St. Charles to permit the development of public facilities, i. e., roads, streets, bridges, schools, libraries, etc., to be a matter of almost haphazard selection. We have never had a long range plan for this type of development. It has come to our attention, however, that such cities as Kirkwood, Jefferson City, and others in this State and many cities in other states have acquired what is known as a city plan. We discovered that a city plan could be obtained by the City by employing Harlan Bartholomew and associates with whom our Missouri State Highway Department is very familiar to make a long range survey for the City. It was proposed that the City pay for the plan and that the general fund of the City be reimbursed to some extent by a contribution from the Chamber of Commerce and by the allocation by the library board, park board, board of public

Sept. 27, 1943

works, and school board to the extent that these public boards would be benefited by having a long range plan in the development of the facilities which each board administers.

"The City of St. Charles is a third class City and there is no express authorization for the employment of a planning engineer of this kind. However, I feel that in view of the Statutes pertaining to zoning and the police powers of the City Council that an expenditure of this kind would be lawful. There does not seem to be much difference between purchasing a plan and hiring an architect for the designing of public buildings except that the plan is of a somewhat longer view point.

"Can a third class City in your opinion expend public funds for the employment of a professional municipal engineering firm to draw up a plan for the future development of public facilities, i. e., streets, schools, sewer systems, water mains, etc., for the City?"

On September 21, 1943, I received a further communication from you addressed to the Attorney-General, which, omitting caption and signature, is as follows:

"On September 17th I requested an opinion concerning the employment of a professional municipal engineering firm to prepare a city plan for the City of St. Charles, Missouri. After a discussion with Mr. Joseph B. Wentker, City Attorney, I should like to broaden my question a little. I mentioned to you in my letter that the general fund of the City would be reimbursed by the Chamber of Commerce, library board, park board, board of public works, and school board for a part of the

funds expended. The County Court would also share a portion of this cost. The matter would be handled in this way because these boards would have a direct benefit from such a plan's being available to them from time to time in the expansion of their facilities. We would therefore also like to know whether there is anything to prevent these boards from appropriating from funds received by them for taxes, or as in the case of the board of public works funds received in the nature of receipts for water service, for a City plan.

"I mentioned the zoning statutes in my letter to you on September 17th. If it is your opinion that the City may obtain and avail itself of a City plan, do you think it has power to do so independent of the zoning statutes, as an implied power of the City in furtherance of its express powers and duties in the matter of streets, sewer systems, building regulations etc., or do you think that a City plan could be obtained only pursuant to the machinery set up for instituting zoning?"

The question involved in this request is whether a city of the third class has the authority to pay a sum of money to an engineering firm for the purpose of preparing and drawing plans for the future growth of said city. There is probably no doubt that the Legislature of the State of Missouri has the power, if it so desires, to grant such authority to a city of the third class, allowing it to make such expenditure. Consequently, we have searched the statutes of the State of Missouri to ascertain whether such authority has ever been granted and we are unable to find any statute which expressly confers upon a city of the third class such authority.

The powers of a municipal corporation are grouped under three classes according to the case of Taylor v. Dimmitt, 78 S. . (2d) 841, 336 Mo. 30. The court said in that case (S. W., l. c. 843):

"* * * 'It is a general and undisputed proposition of law that a municipal .

corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' St. Louis v. Kaime, 180 Mo. loc. cit. 322, 79 S. W. 140, 143 (quoting Dillon, Municipal Corp. vol 1 (4th Ed.) p. 145); State v. Butler, 178 Mo. 272, 77 S. W. 560; St. Louis v. Dreisoerner, 243 Mo. 217, 147 S. W. 998, 41 L. R. A. (N. S.) 177; St. Louis v. King, 226 Mo. 334, 126 S. W. 495, 27 L. R. A. (N. S.) 608, 136 Am. St. Rep. 643; Maryville v. Farmers' Trust Co., 226 Mo. App. 642, 45 S. W. (2d) 103."

As has been stated above, a matter of this kind will not come under the first classification set out in the above case, since the power is not expressly granted by statute. Neither will it fall under the third classification, since it is not essential to the declared objects and purposes of the corporation and is not indispensable. As a result, if a city of the third class has the authority to expend sums of money on a matter of this kind, it must fall into the second classification of powers above, which are those necessarily or fairly implied in, or incident to, the powers expressly granted.

There are numerous powers granted to a city of the third class by the statutes of this State but we are unable to ascertain any power to which a planning campaign is incidental or to which we can attach an implication of necessity. It is, of course, common knowledge that a city of the third class, such as St. Charles, Missouri, has the authority to make public improvements such as the paving of streets, construction of sidewalks, establishment of a sewer system, and many other improvements which we feel it is unnecessary to mention. However, this type of improvements is essential to the declared

objects of the corporation itself. We feel that plans prepared for this type of improvement could be paid for by a city, since they are prepared for a particular enterprise and in all probability will be expressly followed in the construction of such improvement. The plans contemplated in the instant matter apparently are for the purpose of planning the future growth of the City of St. Charles, but are prepared merely as a matter of suggestion to persons or corporations who will at some indefinite future time cause improvements to be made in the city. It does not appear that the suggested plans will have any control whatever over the future construction in the city but will only be advisory in nature.

In your opinion request the statement is made that in view of the zoning powers and also the police powers given other cities of the third class that a procedure such as the one contemplated would be authorized. There, of course, can be no question that municipal corporations such as St. Charles have the power to enact zoning provisions. Since that authority is given to them by Sections 7412 to 7423, R. S. Mo. 1939, and if a plan for such zoning was prepared with the intention of same being adopted, then a different question would be presented. However, as stated above, the plans contemplated in this particular matter would only be used in an advisory capacity and would have no real force and effect.

As stated above, reference is also made in your request to the police powers of a city of the third class being broad enough to authorize the expenditure of money for city planning purposes. Apparently the only reason that a survey of this type is desired, is for aesthetic purposes. The law in this state seems to be that the police power of cities cannot be invoked for mere aesthetic reasons. In the case of City of St. Louis v. Dreiscoerner, 243 Mo. 217, 147 S. W. 998, the court said: (l. c. 223)

"* * * The police power is a necessary and wholesome faculty of municipal government, but it only extends to the regulation of employments prejudicial to the public safety, health, morals and good government of the citizenry, and it 'ends where those public interests are not beneficially served thereby.' (Gunning Co. v. St. Louis, 235 Mo.

l. c. 200) It cannot sanction the confiscation of private property for aesthetic purposes."

Other cases which cite the above case and which hold the same, are *Kansas City v. Liebi*, 298 Mo., l. c. 617 and *State ex rel. Penrose Investment Company v. McKelvey*, 301, l. c. 20.

We might further call your attention to the fact that certain counties in the State of Missouri are expressly given the power to have planning commissions under the statutes of this State. Under the Laws of Missouri, 1941, at page 465 and continuing to page 480, we find where certain counties are authorized to set up a planning commission. We further find in the Laws of Missouri, 1941, at page 481 to page 489, where other counties are authorized to set up a planning commission. Since the Legislature has seen fit to enact provisions authorizing a county to form a planning commission, it would seem that the Legislature realized and was conscious of the fact that such power was not a power which could be implied from any other statutory provision. Reasoning therefrom, we feel that if the Legislature of the State intended that a city of the third class should have a planning commission or should have the authority to expend sums of money from its general revenue fund, or for that matter from any other fund, that the Legislature would have expressly so stated in the form of a provision passed by it.

In view of the decisions and statutes set out above it is our opinion that a power of the kind contemplated in your request cannot be one which is necessarily implied from or incident to those powers expressly granted to a city by the Legislature of the State of Missouri. As we have said above, apparently this plan is intended for aesthetic purposes alone and we do not feel that under the decisions a city of the third class has the authority to expend sums of money from the general revenue fund for the purposes of paying an engineering firm for the preparation of a city plan.

Since our opinion is as stated, it is unnecessary to consider the diversion of moneys from other funds for the purpose of paying it into the general revenue fund where such money

Sept. 27, 1943

can then be expended for the purposes outlined in your request. If the city has no power to expend the money from the general revenue fund, then the other question would not be pertinent.

CONCLUSION

Therefore, it is the opinion of this Department that the City of St. Charles, Missouri, a city of the third class, is not empowered to expend public funds for the employment of a professional municipal engineering firm for the purpose of preparing a plan for the future development of public facilities, streets, schools, sewer systems, water mains et cetera, for the City of St. Charles, Missouri, unless the city reasonably contemplates in the future zoning the city, constructing new public facilities or improving the public facilities which are now in existence.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

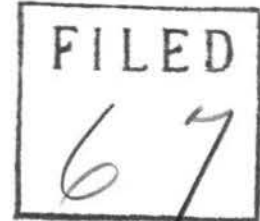
APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

SHERIFFS: County Court may allow and pay claims of sheriffs for services rendered in juvenile court.

October 13, 1943



Honorable Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Niedner:

The Attorney-General wishes to acknowledge receipt of your letter of October 6, 1943, in which you request an opinion of this department. This opinion request, omitting caption and signature, is as follows:

"The committee of auditors which has just completed auditing the books and records of St. Charles County have raised a question about whether it is lawful for the County Court to allow and pay Sheriff's fees for serving subpoenas, summons and warrants issued by the Circuit Clerk at the request of the Prosecuting Attorney in causes filed in the Juvenile Court. The Sheriff happens also to be the County Superintendent of Public Welfare and as such must attend Juvenile Court and do such acts as are provided by law to be the duties of the Superintendent of Public Welfare; however, I do not find among those duties the duty to serve writs of the kind above mentioned and I have felt that such writs issued by the Circuit Clerk were served by the Sheriff simply as Sheriff and not as Superintendent of Public Welfare.

"Would you please render us an opinion in accordance with the request made by the auditors as to whether the above type of fees are allowable."

The Superintendent of Public Welfare is appointed pursuant to the provisions of Section 9719, R. S. Mo. 1939. This section provides as follows:

"The county court in each county may in its discretion appoint a county superintendent of public welfare, and such assistants as it may deem necessary. Whenever the county court of any county has appointed a superintendent of public welfare such officer shall assume all the powers and duties now conferred by law upon the probation or parole officer of such county and shall assume all the powers and duties of the attendance officer in said county and all the powers and the duties of the attendance officer in any incorporated town or village having a population of more than 1,000 inhabitants, and no other or different probation or parole officer or attendance officer or officers shall be appointed by the judge of the juvenile court, by the county superintendent of public schools, or by the school board or any incorporated city, town or village school district or consolidated school district; Providing, however, that the provision of this section shall not apply to counties which now have or which shall hereafter have a population of more than 50,000 inhabitants."

It will be noted that the County Superintendent of Public Welfare "shall assume all the powers and duties now conferred by law upon the probation or parole officer of such county." The Laws of 1921, page 586 et seq., which provided for the appointment of a Superintendent of Public Welfare and also prescribed his powers and duties, which included those conferred on the probation officer, impliedly repealed Section 9708, R. S. Mo. 1939, providing for the appointment of a probation officer (Poindexter v. Pettis County, 246 S. W. 38, 295 Mo. 629); however, for some unaccountable reason the latter statute is still on the statute books. So, in order for us to arrive at a conclusion as to what the powers and duties of the Superintendent of Public Welfare are,

it is necessary for us to examine the statutes relative to the probation officer which are impliedly repealed. Consequently, we wish to call your attention to the provisions of Section 9710, R. S. Mo. 1939, which are:

"Whenever there is to be a child brought before the court under this law, it shall be the duty of the clerk of said court to so notify the probation officer in advance. It shall be the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court at the hearings of all cases, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after hearing, as may be directed by the court. Probation officers shall have all the powers of peace officers anywhere in the state for the purposes of this article."

It will be seen that probation officers shall have all the powers of peace officers anywhere in the State for the purposes of the article of the statutes. Under the provisions of Section 9719, supra, these powers automatically vest in the County Superintendent of Public Welfare. It will be further noted that the probation officer shall make investigations and be present at all hearings in juvenile court, which duties also automatically vest in the County Superintendent of Public Welfare. As a result of such provision we feel that the latter has authority to serve subpoenas issued by the Circuit Clerk to compel the attendance of witnesses in juvenile proceedings.

Section 9719, R. S. Mo. 1939, does not require the County Court to appoint a Superintendent of Public Welfare, but provides that it may do so, in its discretion. There are possibly many counties that do not have an officer of this kind and in that case there must be some officer having a like authority who can serve the subpoenas for the juvenile hearings. In view of the fact that the juvenile court is merely a part of the circuit court, we feel that the sheriff, who is an officer of the circuit court, is the officer having the authority to perform such duties. If the Legislature had intended that the

Superintendent of Public Welfare was to have exclusive authority to perform such duties, we feel that it would have made the appointment of such officer mandatory instead of discretionary.

Attention is next called to Section 9716, R. S. Mo. 1939, which prescribes the following:

"The court shall have power to devise and publish rules and regulate the procedure for cases coming within the provisions of this article, and for the conduct of all probation and other officers of the court in such cases, and such rules shall be enforced and construed beneficially for the remedial purposes embraced herein. The court may devise and cause to be printed for public use such forms for records and for the various petitions, orders, process and other papers in the cases coming under this article as shall meet the requirements thereof; and all the expenses incurred by the court in complying with the provisions of this article shall be a county charge."

As a result of the above statute, it appears to us that the expenses of the juvenile court proceedings are a county expense and consequently the county court is authorized to allow claims for expenses incurred in such proceedings.

Section 13411, R. S. Mo. 1939, sets up a schedule of fees to be allowed for certain services rendered by the sheriff. Under this section of the statutes the sheriff is allowed numerous fees for services which he renders. It will be noted that under Section 13413, R. S. Mo. 1939, the sheriffs and other officers are allowed certain fees for services rendered in criminal actions. However, it has been held that proceedings in a juvenile court are not criminal in their nature and therefore Section 13411, supra, will apply. See *State v. Buckner*, 254 S. W. 179.

Conclusion

Therefore, it is the opinion of this department that it is lawful for the County Court of St. Charles County to allow and pay sheriff's fees for his services in serving subpoenas and summons issued by the Circuit Court at the request of the Prosecuting Attorney in causes filed in the Juvenile Court.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

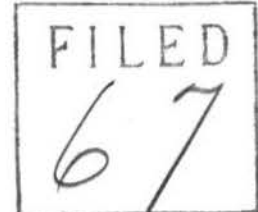
APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

SCHOOL FUND MORTGAGES: Proper disposition of income by County Court for repossessed real estate; whether credited to interest fund or capital school fund itself.

October 27, 1943



Mr. Ben Nordberg
County Clerk
Jackson County
Kansas City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 8th in which you request the opinion of this department. Your letter is as follows:

"The County Court of Jackson County, Missouri, recently made an order pertaining to the method of bookkeeping applicable to the Capital School Fund of Jackson County, Missouri, which order provides among other things as follows:

"That all income from interest, rentals, commissions, appraisals and other sources (except such as is required by law to be credited to capital account and except profits on sale of foreclosed property) be credited to the interest fund, that all administrative and other expenses (except foreclosure expenses, back taxes and losses on sale of foreclosed property) be charged against the interest fund."

"The legality of this court order has been questioned, and I am appealing to you for a ruling upon two points - (1) In the event property acquired through foreclosure of mortgage made from the Capital School Fund is rented, or any income is received

therefrom other than interest, should the income received be credited to the Interest Fund or should the income be credited to the Capital School Fund itself. (2) Is it proper that all administrative expenses incurred by reason of administration of the Capital School Fund be charged against the Interest Fund, or is it permissible or mandatory that expense incidental to the management and inspection of the school fund be properly charged against the school fund itself."

We shall answer your two questions in the order submitted above.

Article XI, Section 8 of the Missouri Constitution, provides as follows:

"All moneys, stocks, bonds, lands and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

Pursuant to the above section of the Constitution, Section 10376, R. S. Mo. 1939 was enacted. This section makes it the duty of the county court to preserve and securely invest the school fund monies and it is stated in the following language:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, * * * * * property belonging to the county school fund; * * * * *"

The Supreme Court of Missouri in the case of Ray County, to the use of the Common School Fund v. Bentley, et al., 49 Mo. l. c. 242, said:

"* * * The county is not the owner of the fund; the title is simply vested in it as trustee, for convenience, to carry out the policy devised by the law-making power for the appropriation and distribution of the fund. In the care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. * * * * *

And further, in the case of Morrow v. Pike Co., 189 Mo. 610, l. c. 622, the court said:

"* * * the public school fund does not belong to the county in a technical sense.

It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund * * * * ."

From the foregoing it will be observed that the county court, in the care, management and control of the school funds, acts as a trustee of said funds.

Section 10389, R. S. Mo. 1939, sets out the duties and obligations of the county court where it becomes necessary for the county court to protect the interest of the schools in the event of the foreclosure of a school fund mortgage. This section provides as follows:

"Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in

such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

When it becomes necessary for the protection of the township school funds, or the general school funds, that the property be foreclosed and purchased, it is the duty of the county court to hold and manage said property for the use of the respective school funds involved.

We think it proper, after the county has acquired property through foreclosure proceedings, for it to set up a special account for each property foreclosed and repossessed by the county, and in this account should be deposited all rents, royalties and other income, and from this account all items of expense in connection with said repossessed property should be paid. Such expense including maintenance, repairs, insurance and other items of expense. If and when the property is disposed of, it then can be determined whether there is a profit or loss to the particular fund involved, from that particular property. If this procedure is followed and there is a balance left it will be reflected in such gain to the school fund. Until this is done there is no income to be distributed to the various schools.

However, when this balance, which has been lodged in the school fund, is reloaned the public schools will then receive the benefit through the interest earned.

CONCLUSION

It is, therefore, (1) our opinion that the income derived from the property should not be credited to the interest fund, but should go into the school fund itself, for the reason that it cannot be determined that there is an income until all expenses in connection with the particular property have been paid.

Mr. Ben Nordberg

-6-

10-27-43

It is further (2) our opinion that the expenses incurred in the administration of the capital school fund should be charged against the capital school fund itself.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

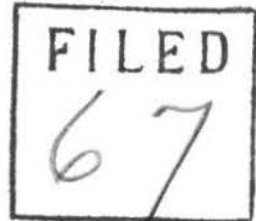
CRH:CP

APPROVED:

ROY MCKITTRICK
Attorney-General

FARM BUREAU: Definition of "rural population" to be used
in determining maximum appropriation.

December 30, 1943.



Mr. Robert V. Niedner,
Prosecuting Attorney
St. Charles County,
St. Charles, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of
December 21, 1943, as follows:

"I wish to have your opinion concerning
the construction of the term 'rural population'
as used in the 7th paragraph on Page 321 in
the Laws of Missouri for 1943. My question
more specifically is whether or not the term
rural population as so used includes the popu-
lation of fourth class cities, villages and
towns as defined in Article 9, Chapter 38,
and Article 10, Chapter 38, of the Revised
Statutes of Missouri for 1939.

"The County Court of St. Charles County is
attempting to determine what residents of
St. Charles County constitute its rural popu-
lation for the purpose of determining the
County's share of the cost of carrying on
cooperative extension work provided in the
Act of the General Assembly pertaining to
agriculture set out on Pages 319 to 323 of
the Laws of Missouri for 1943."

The Act of the General Assembly appearing in Laws
1943, pp. 319-323 relates to support of county farm organiza-
tion by the various county courts. Section 5 of the Act makes
it mandatory upon the county courts to budget for the use of
such organizations a fixed minimum sum determined according to
the total assessed valuation of the county. It then provides:

"* * * that no county shall appropriate more than twenty-five (25) cents per capita of the rural population as determined by the last federal census:"

It appears to us that since the population figure to be used in determining the maximum appropriation is the rural population "as determined by the last federal census", we must look to the classification or definition of "rural population" used by the United States Census Bureau in taking the 1940 census. To do otherwise would lead to an absurd result. For example, if the U. S. Census Bureau classes all incorporated areas of 2500 or less as rural (we do not know whether it does or not), and we were to say that "rural population", as that term is used in Section 5, means the population residing in fourth class cities (3000 - 500, Sec. 6215 R.S. Mo. 1939), villages (500 or less, Sec. 6216, R.S. Mo. 1939) and unincorporated areas, then any computation of rural population by the county court based on our ruling would not be "as determined by the last federal census"; it would be an enumeration, probably using the census reports of necessity, but classing certain areas different from the classification used by the U.S. Census Bureau when it made up that report. Were that to be done then the result reached would not reflect the rural population "as determined by the last federal census" but rather would reflect the rural population as determined by the county court.

In the reports of the U. S. Census Bureau for 1940 on the State of Missouri, we find that while there is a table showing the rural population for the whole state, no table is given breaking this down by counties. However, provision is made for obtaining such information from the United States Bureau of the Census, Washington, D.C., in 13 U.S.C.A. 218, where it is provided:

"The Director of the Census is authorized at his discretion, upon the written request * * * of a court of record, to furnish such * * * court of record with certified copies of so much of the population * * * returns as may be requested, upon payment of the actual cost of making such copies and \$1 additional for certification; * * *".

Mr. Robert V. Niedner,

-3-

12-30-43.

The County Court is a court of record (Sec. 1990, R. S. Mo. 1939) and is therefore entitled to receive this information from the Census Bureau.

CONCLUSION.

Therefore, it is our opinion the term of "rural population" as used in Section 5, Laws 1943, p. 321, is that classification or definition used by the U. S. Bureau of Census in taking and compiling the 1940 census. Said figures should be obtained from the Bureau of the Census and be used to determine the maximum appropriation which can be made by the County Court for support of the County Farm Organization.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK,
Attorney-General.

LLB/LD

OFFICERS: Presiding judge of the county court may be
appointed deputy circuit clerk.

January 26, 1943

Honorable A. E. Orchard
Presiding Judge of County Court
Shannon County
Eminence, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of January 26, 1943, which reads as follows:

"Will you please give me an official
opinion as to whether I, as presiding
judge, can be appointed as deputy
circuit clerk of Shannon County?"

In answer to your request, we are submitting
a copy of an opinion rendered by this office to the
Honorable William Barton, Member of House of Representa-
tives, Jonesburg, Missouri, dated December 28, 1942,
in which we held that a person may hold the office of
justice of the peace, and coroner, for the reason that
the duties of either office are not incompatible, con-
flicting, repugnant or inconsistent with the duties of
the other. We are enclosing this opinion in order to
set out the rule of incompatibility. Since this opinion
holds that there are no constitutional or statutory
prohibitions preventing a person from holding two county
offices, the question then reverts to the common law as
to whether or not the two positions are incompatible or
inconsistent. In this opinion, at page five, we set out
Section 46, of 45 Corpus Juris, which states the general
rule as to incompatibility. In a careful research of the
duties of a presiding judge of a county court, and the

Honorable A. E. Orchard

(2)

January 26, 1943

duties of a deputy circuit clerk, we find no duties that are incompatible, conflicting, repugnant, or inconsistent, nor do we find any duties imposed upon a judge of the county court, or upon a deputy circuit clerk, wherein one is subordinate in some degree to the supervisory power of an incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other, or to audit the accounts of the other.

We are also enclosing a copy of an opinion rendered by this office to the Honorable Robert H. Frost, Prosecuting Attorney, Clinton County, Plattsburg, Missouri, dated December 29, 1942, in which we held that in counties having a population of less than nineteen thousand, where the circuit clerk is also ex officio recorder of deeds, his deputies must be approved or disapproved by the judge of the circuit court, and not by the county court, for the reason that the deputies are not deputy recorders of deeds, but are deputy circuit clerks acting as deputy recorders of deeds.

Section 13495 R. S. Missouri, 1939, reads as follows:

"The number of all deputies required by any county office shall be submitted to the county court, and the county court shall by order of record, permit such number as in their opinion the necessary duties of the office require, and it shall be the duty of each officer to submit the names of the deputies appointed not to exceed in number the number allowed by the county court, and such names shall be made a matter of record by the county court."

January 26, 1943

Under the above section the number of all deputies required by any county office shall be submitted to the county court which passes upon the number of deputies. We cite this section, for the reason that deputy circuit clerks are an exception to that section, because, under Section 13434 R. S. Missouri, 1939, which is set out in our opinion to Honorable Robert H. Frost, herein enclosed, the clerk of the circuit court shall be entitled to such number of deputies and assistants, to be appointed by the circuit clerk, with the approval of the judge or judges of the circuit court, and not by the judges of the county court, as set out under the general section, 13495, supra.

Also, under Section 13434, supra, which applies to the appointment of deputy circuit clerks, the judge or judges of the circuit court in their order permitting the clerk to appoint deputies, or assistants, the compensation of such deputies or assistants, and the time for which such deputies may be employed, shall be fixed. By reason of this section the county court does not pass upon the number or compensation of the deputy circuit clerks, and it lies solely in the discretion of the judge or judges of the circuit courts.

The population of Shannon County is 11831.

CONCLUSION

It is, therefore, the opinion of this department, that the presiding judge of Shannon County, may be appointed by the clerk of the circuit court as a deputy circuit clerk, with the approval of the judge of the circuit court, for the reason that the duties of the

Honorable A. E. Orchard

(4)

January 26, 1943

presiding judge of the county court and the duties of a deputy circuit clerk are not incompatible, conflicting, repugnant or inconsistent with the duties of the other.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

LIQUOR CONTROL:

Minor may not be employed to make deliveries of liquor.

August 14, 1943

8/16



Hon. Michael W. O'Hern
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 4, 1943, as follows:

"Mr. Dave Witcher has requested that we write to you for an opinion with reference to the legality of a minor during the summer months when school is not in session making deliveries of beer, wines and other liquors from drug stores to the home of citizens on telephone orders.

"Mr. Witcher is the Secretary of the Tavern Owners Association of Kansas City, Missouri, and has stated to us that you furnished an opinion to Mr. Wayne G. Henderson, State Liquor Control Supervisor, to the effect that deliveries of this character were illegal."

In an opinion rendered September 13, 1940 to W. W. Graves, we held that a person holding an original package license could accept a telephone order for the sale of liquor, which was to be thereafter delivered, and not run counter to Section 4881 Mo. R. S. A. prohibiting the sale of intoxicating liquor at any place other than that designated in the license. That opinion turned on the rule that, in the absence of a special contract, a "sale" is complete when the article is identified, the price agreed upon, and said article is segregated from the general stock. Thus, a "sale" not including delivery and collection of the purchase price, the fact that the last acts enumerated occurred off the licensed premises did not cause the licensed person to violate the law.

The present question involves the last sentence of Section 4885 Mo. R. S. A. providing:

"* * * * No person under the age of twenty-one years shall sell or assist in the sale or dispensing of intoxicating liquor."

Under the rule applied in our former opinion, a minor who delivers a package of liquor from the licensed place of business of the vendor to the home of the vendee, and there collects the purchase price, would not be selling or assisting in the sale of the intoxicating liquor. But, that does not dispose of this question, because under Section 4885 the minor is also prohibited from "dispensing" intoxicating liquor and that term has a much broader meaning than does the word "sell", and hence in *Sawyer v. Frank*, 131 N. W. 761 (Iowa), where the statute prohibited the manufacture, sale, exchange, bartering or dispensing of intoxicating liquor, it was said (l. c. 762):

"* * * * The provision extends to the dispensing of such liquors and the use of the word 'dispense' in the alternative with 'manufacture, sell, exchange, barter' plainly indicates that it was not intended to describe an act which is included in selling, but, on the contrary, that the word is used to describe an independent and distinct method of being concerned in the disposal of such liquors."

The same reasoning is applicable to Section 4885, for there the word "dispensing" is used in the alternative with the word "sell", consequently, said word is intended to reach some act performed in connection with selling liquor other than the acts connected with the sale itself.

In *State v. Ball*, 123 N. W. 826, 827 (N. D.) it is said that:

"'Dispense' means to deal out in portions; to distribute; to give."

In U. S. v. Reynolds, 244 Fed. 991, the statute prohibited "dispensing" of narcotic drugs except under certain conditions. A physician wrote a prescription for a drug which was filled by a druggist. He was charged with illegally dispensing the drug. The court in sustaining a demurrer held:

"As therein used, 'dispense' relates to actual delivery of the drug by the physician to the patient, from the formers office supply * * * * *".

In 27 C. J. S. page 344 it is stated:

"In its etymological sense, the word (dispense) has been held to connote ownership, possession, or control, actual, apparent, or pretensive, in the dispenser for himself or another, and the voluntary parting with the possession, ownership or control, and actual delivery from a supply owned by the dispenser; * * * * *"

A minor, in making a delivery of intoxicating liquor, would be acting for his employer, the vendor. As noted above, the courts have held "distributing" and "delivering" to constitute acts of "dispensing". The delivery, here, is made by the minor from a supply owned by his employer; the minor has possession and control of the liquor for his employer while it is in transit, and he voluntarily parts with that possession to the vendee. The acts being performed by the vendor, by and through his agent, the minor, constitute acts of dispensing liquor by the vendor. Thus, the vendor by having his employee deliver liquor is engaged, through that employee, in dispensing the same. Since the act of dispensing is actually performed by the minor employee, said minor is employed in dispensing liquor in violation of Section 4885.

CONCLUSION

It is therefore our opinion that a licensed vendor of intoxicating liquor may not employ a minor to make delivery

Hon. Michael W. O'Hern

-4-

August 14, 1943.

of the liquor which he sells.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:jn

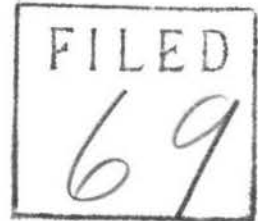
TAXATION:

PENALTIES AND INTEREST:

Penalties and interest on taxes may not be charged in cases where the taxpayer was unable to pay the taxes before they became delinquent on account of the death of the collector. Check is not legal tender for payment of taxes.

January 7, 1943

Miss Hazel Palmer
County Collector
Pettis County
Sedalia, Missouri



Dear Miss Palmer:

This is in reply to yours of recent date wherein you submit the questions concerning:

1. The authority to charge and impose interest and penalties on delinquent taxes which were not paid before delinquent date on account of the death of the collector;
2. The authority of a person to receive taxes before he has qualified to act as collector; and
3. The payment of taxes by check.

From your statement of facts it appears that the Collector of that County died during the month of December, 1942, and that no person qualified to collect taxes in that County until after January, 1943, at which time taxes became delinquent.

Section 11075, R. S. Mo. 1939, which relates to a vacancy in the office of County Collector on account of the death of such collector, is as follows:

"In case of the death, resignation, removal or other disability of any county collector, during the time the tax books are in his hands, and before the time specified in this chapter for making settlements, the county clerk shall demand and take charge of the tax books. Said clerk shall appoint one competent person, the legal representatives of the collector may choose a second, and the sureties of the collector may choose a third, and the persons so appointed and chosen shall examine said tax books, and it shall be their duty to ascertain the amount remaining uncollected, and make out a correct abstract of the same. If the representatives or sureties of such collector shall fail or refuse to choose persons to make such examination, then the person appointed by the county clerk shall proceed to make the same and report the same to the county clerk: Provided, that should there be but a small portion of the taxes collected at the time of the death of the collector, then the amount actually collected shall be ascertained and the same books used in completing the collections."

Section 11076, R. S. Mo. 1939, which relates to the same subject matter, provides as follows:

"Whenever any collector shall die after he has received the tax book for any year, his legal representatives shall hand over at once to the county clerk the tax book, and shall also pay over to his successor in office, at once, out of the estate, all moneys which have been collected by the deceased collector and then in his hands."

Under Section 11076, supra, the books of the county collector are, upon the death of such collector, at once turned over to the county clerk. No duties are imposed upon, or authority granted to, the county clerk to collect any taxes upon these books.

Under Section 11075, supra, it is the duty of the county clerk, together with other persons named in that section, when he receives these books to ascertain the amount remaining uncollected and to make an abstract thereof.

Since no statutory provisions are made for any person to pay his taxes during the time from the date of the death of the collector until his successor is appointed, or elected, and qualified, then it would be impossible for the taxpayer to pay the taxes before they become delinquent if the delinquent date occurs during the interim in which there is no collector in office.

Under Section 11085, R. S. Mo. 1939, a penalty is imposed if the tax is not paid by January first after the taxes become due. This section reads as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer

who shall pay his taxes to the collector at any time before the first day of January in each year: Provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation. Whenever any collector of the revenue in the state fails or refuses to collect the penalty provided for in this section on state and county taxes, it shall be the duty of the state auditor and county clerk to charge such collectors with the amount of interest due thereon, as shown by the returns of the county clerk, and such collector shall be liable to the penalties as provided for in section 11099."

It will be noted that under this section the collector is liable for these penalties in cases where he fails to collect same.

In the case of State ex rel. Western Union Tel. Co. v. Markway, 341 Mo. 976, 981, the Supreme Court of this state recognized the rule that "equity follows the law" in tax matters. The court also said in that case, l. c. 979:

"The power to levy and collect taxes is purely statutory, and has been confided to the Legislature and not the courts.' (State ex rel. Parish v. Young, 327 Mo. 909, l. c. 915, 38 S. W. (2d) 1021.) 'It is well established that the right of the taxing authority to levy a particular tax must be clearly

authorized by the statute, and that
all such laws are to be construed
strictly against such taxing authority."

The rule of construction of statutes imposing penalties and interest is that such statutes shall receive a strict construction and nothing taken by intendment.

While Section 11085, supra, does impose a penalty in case taxes are not paid on January first, yet no provisions are made for a penalty in a case where the taxpayer fails to pay the taxes before delinquent date because there is no one to whom he can make payment. Applying the rule announced in the Markway case, supra, it might be held that the taxing authorities would not be authorized to impose a penalty where the state has no one to whom taxes could be paid to avoid penalties.

We think the rule announced in 61 C. J. page 1489, sec. 2134, would be applicable here. Said rule reads as follows:

"A penalty for nonpayment cannot be imposed until the taxpayer has had an opportunity to pay it and fails to do so within the full time allowed by law in which to make a voluntary payment;
*****"

Cooley on Taxation, Fourth Edition, Vol. 3, at page 2538, announces a rule which would be applicable in this case, we think, and which reads as follows:

"* * * Interest or penalties cannot be imposed where the taxpayer could not pay the taxes because the collector refused to accept payment unless payment was also made of taxes erroneously assessed, or where, for other reasons, the state could not accept the tax. * * *"

(Underscoring ours.)

In this case we have a condition in which it is impossible for the taxpayer to pay the taxes before delinquency because the state did not have any agency that could accept the tax.

On the question of the authority of the taxpayers to mail checks to you, as the newly appointed collector, before January first, to avoid penalties, will say that we do not find where that would relieve such taxpayers of penalties if they are liable for penalties. You would not be the duly appointed, qualified and acting collector and would not be authorized to accept monies in payment of taxes.

Section 11077, R. S. Mo. 1939, provides as follows:

"The new collector shall execute receipts in triplicate, to be attested by the clerk of the county court, for the tax book so delivered, and showing the amount already collected upon the same; also, receipts in triplicate for the amount of taxes collected by the deceased collector, from all sources, and paid over to him by the administrator or executor; one of each of which receipts shall be certified by the clerk to the state auditor, who shall thereupon charge the new collector with the balance of the state taxes due on the tax book, and the amount paid over to him by the executor or administrator of the deceased; another shall be filed in the office of the clerk of the county court, upon which to charge the new collector with the county revenue; and the third shall be given to the executor or administrator of the deceased collector."

In addition to this, you are required to execute a bond in compliance with the statute before you can qualify as collector and be authorized under the statute to perform the duties of the office.

On the question of what shall be received in payment of taxes we refer you to Section 11082, R. S. Mo. 1939, which is as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year.

CONCLUSION

From the foregoing, it is the opinion of this department that:

1. Penalties and interest may not be imposed and inflicted for non-payment of taxes on January first, where the collector has died on or before December 31st, and no successor has been appointed and qualified.

Penalties and interest may not be imposed until the successor is duly appointed and qualified and then only at the next penalty date after such appointment and qualification.

2. A person, before being qualified to act as collector, is not authorized to accept checks for taxes and the tender of payment of taxes by check, or otherwise, would not relieve the taxpayer of the penalty, if any.

3. Checks tendered in payment of taxes do not constitute tender under the statutes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

TWB:CP

TAXATION: (What tax penalties persons in military service
are excused from paying;) how collector is to
PENALTIES: account to court for excused penalties; burden
is on taxpayer to claim the right to be excused.

April 5, 1943

Miss Hazel Palmer
County Collector
Pettis County
Sedalia, Missouri



Dear Miss Palmer:

This will acknowledge receipt of your letter of
March 19, 1943, as follows:

"A few times I have been presented with the
fact that a taxpayer is in the armed forces of
the United States, and the question as to whe-
ther or not he has to pay any penalties on his
taxes.

"Section 11085 R. S. 1939, provides for penalty
after January 1, with this further provision:
'said interest shall not be chargeable against
persons who are absent from their homes, and
engaged in the military service of this state
or of the United States.'

"Will you please advise me whether or not a col-
lector shall not add any penalties to a soldier's
delinquent taxes?

"Does the fact that the taxes may be delinquent
for 1939, 1940, 1941 and 1942, before the tax-
payer became a soldier, enter into it? If a
person comes in now to pay taxes for a soldier
and the taxes have not been paid for several
years, should the collector not add any penalties
to taxes for any year?

"If the receipt is marked paid in full after de-
linquent date, revealing only the original amount

of the tax collected, how should the matter be handled to account for such penalty, including interest, costs of clerk, and commission, not having been collected? Unless the collector knows of her own knowledge that such taxpayer is in military service, should she just accept the person's word who is paying the taxes that the person who owes them is in military service? (Naturally if one pays taxes for a soldier and does not mention the fact that he is a soldier, the collector will include penalties. Therefore, such collector could not be said to have violated the exception to the provisions of Section 11085. Is that correct?)"

The questions you present seem to be:

(1) What are members of the military forces excused from paying under Section 11085 R. S. Mo., 1939, when their tax is delinquent?

(2) Does the relief granted to such person extend to those penalties accruing before such person entered the military service?

(3) How is the collector to account to the county court for the excused items?

(4) If someone else pays taxes for a person in the military service, and the fact of such service is unknown to the collector and the penalty is collected, has the collector violated Section 11085 R. S. Mo., 1939?

Miss Hazel Palmer

-3-

April 1, 1943

I

In connection with the first question it appears that Section 11085 R. S. Mo., 1939, provides, in part, as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year: * * * * *

(Underscoring ours,)

The question seems to turn on what was intended by the use of the word "interest" in stating what shall not be charged to persons in military service. In *Seaboard National Bank v. Woesten*, 176 Mo. 49, this very point was under discussion. The Court said (l. c. 62):

"The laws of this State (sec. 9225, R. S. 1899) prescribe that if any one fails to pay his general taxes before the end of the year, 'an additional tax, as penalty, of one per cent per month' shall be added. The section then says that 'said additional tax or penalty' shall apply to a fraction of a month, and then adds: 'Provided, however, that said interest shall not be chargeable against persons who are absent from their homes,' etc.

"It will be observed that the one per cent a month, is first called 'an additional tax as penalty' and then it is called 'said additional tax or penalty,' and finally it is called 'said interest,' thus showing the looseness of expression that may be employed in the same section of the statute when referring to the same matter. But the term employed does not change the character of the imposition. It is not an 'additional tax' at all, for regarded as a tax it would or possibly might be illegal, because the full amount of taxes that the Constitution permitted had already been levied. It is not 'interest' in any proper sense, because it is a penalty imposed for a failure to discharge a duty that can be lawfully demanded."

Since that decision was rendered (1903) there has been some change in the language of the section, but not as to the use of the word "interest" as meaning the penalty imposed for delinquency. The amount of the penalty is now determined by reference to Section 11124 R. S. Mo., 1939, which fixes the penalty at ten per cent of the delinquent tax for the preceding year, and an additional ten per cent for each year prior to the preceding year.

The matter may be better understood, if we briefly review the procedure in taxing property. Between June first in 1941, and the following January first, the assessor makes an assessment of all property by placing a value thereon (Section 10950 R. S. Mo., 1939). Thereafter, the assessor must deliver his books to the county court by January 20, 1942 (Section 10990 R. S. Mo., 1939). Then on the first Monday in April, 1942, the county board of equalization meets to adjust and equalize the assessment and valuation of all property assessed by the assessor (Secs. 11001, 11002, R. S. Mo., 1939). As soon as the assessor's books are adjusted and corrected, and within ninety days thereafter, the clerk of the county court extends the taxes on the tax books (Section 11048 R. S. Mo., 1939). As soon as this is done the tax books are delivered to the collector (Section 11052 R. S. Mo., 1939). Immediately after the collector receives the tax books it is his duty to give the taxpayers twenty days notice of the time and place he will meet the taxpayers and receive their taxes (Section 11079 R. S. Mo., 1939). It is then the duty of the taxpayers to meet the collector at the time and place appointed and pay their taxes (Section 11081 R. S. Mo., 1939).

The collector has power to seize and sell property after October first (Section 11086 R. S. Mo., 1939). If the tax is not paid by January 1, 1943, then between that date and July 1, 1943, it is the duty of the collector to make out the delinquent list into a "back tax book" adding to the delinquent tax a penalty of ten per cent of the tax for the preceding year, and if the tax is one that had previously been returned delinquent the collector is to add an additional ten (10%) per cent penalty for each year prior to the preceding year, said penalty being subject to reduction to one (1%) per cent a month if the tax is paid prior to the sale of the property. The collector is to certify to this list and compare the same with the county clerk. The collector is then charged with the taxes, penalties and interest shown on such delinquent list (Section 11124 R. S. Mo., 1939). Then it is the collector's duty to collect the tax due plus the penal-

Miss Hazel Palmer

-6-

April 5, 1943

ties imposed (Section 11085 R. S. Mo., 1939).

It is the penalty thus imposed that the person in military service is relieved from paying when he pays a tax that has gone delinquent. Since in your letter you mention the penalty as including "interest, costs of clerk, and commission", we desire to emphasize that it is only the penalties accruing under Section 11124, supra, that are excused. Such does not include the items previously quoted.

II

Your second question is answered in our opinion rendered to W. A. Holloway on April 28, 1942, wherein we conclude that Section 11085 R. S. Mo., 1939, did not relieve the man in service from those penalties that accrued prior to the time he entered such military service. A copy of this opinion is enclosed.

III

No rule seems to have been prescribed as to what evidence must be presented to the collector before he is justified in accepting payment of a tax without penalty on the ground that the taxpayer was in the military service at the time the penalty accrued. However, since such excused penalties must be accounted for in the annual settlement with the county court, it is our suggestion that you consult with that body and ascertain just what evidence they will require of you before they will give you credit in

Miss Hazel Palmer

-7-

April 5, 1943

your settlement for such excused penalties.

IV

Your fourth question appears to rest upon whether it is the collector's duty to ascertain whether a person was in the military service at the time a penalty accrued and refrain from collecting the penalty, or whether the burden rests upon the taxpayer to bring himself within the terms of the statute and claim his privilege to be excused. We find no cases on this question; but, since Section 11085, supra, is in effect, a statute relieving one of a burden arising from and connected with taxation of property, we think the rule applied to construction of tax exemptions should be applied here. In *St. Louis Young Men's Christian Ass'n v. Gehner*, (Mo. Sup.) 47 S. W. (2d) 776, the Court, in discussing the right of a taxpayer to claim a tax exemption, said (l. c. 777):

" * * * * * and the burden of establishing it is upon him who claims it. * * * * * "

Again in *National Cemetery Ass'n of Missouri v. Benson*, (Mo. Sup.) 129 S. W. (2d) 842, 845, the same rule was stated:

" * * * * * The burden is on the property owner clearly to establish that his property falls within the exempted class. * * * * * "

Miss Hazel Palmer

-8-

April 5, 1943

Likewise we think the burden is upon the taxpayer to establish that he falls within the class that is excused from paying the penalty. He is the one claiming the right to be relieved of the penalty and the burden of establishing his right to be excused must rest upon him.

Therefore, when someone pays taxes for a man in service who is entitled to be relieved of the penalty and does not supply the collector with the proof he desires in connection with determining whether such person is entitled to be relieved of the penalty, it cannot be said that the collector, in collecting said penalty, has violated Section 11085 R. S. Mo., 1939.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:FS
enc. 1

- COOLS: (1) County superintendent does not have to be a taxpayer;
(2) Poll books not required in elections for county superintendent.

April 10, 1943



Mr. Raymond H. Patterson
County Superintendent of Schools
Galena, Missouri

Dear Sir:

We have your letter of the 7th, which reads as follows:

"Please give your opinion on the following at once if possible.

"1. Can a person qualify for Co. Supt. of Schools if he has not paid any tax in the county?

"2. Is it legal in a Co. Supt. election where there was no poll books sent out to the district to list the names in, and the clerks just return ballots for the votes to be checked by? Also tally sheets were sent but no book."

We will answer your questions in the order asked in your letter.

I.

The qualifications for a county school superintendent are set forth in Section 10609, R. S. Missouri, in the following language:

" * * * said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; * * * * "

It will be seen from the above that there is no provision that a person must be a taxpayer before he can be county superintendent.

CONCLUSION

It is, therefore, the opinion of this office that a person can qualify for county superintendent of schools without being a taxpayer.

II.

The provisions of the law for making reports of votes cast for county superintendent are found in Section 10610, R. S. Missouri, 1939, in the following language:

April 10, 1943

"At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the clerk of the county court shall mail by registered letter to the president or clerk of the board of school directors of the various districts of the county a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall, so far as practical, conform to the form of poll books set out in section 11490, article 2, chapter 76, R. S. 1939, relating to general elections, and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. * * * * "

The above provision requires the county clerk to send out to the districts tally sheets for the use of such districts in making returns of the voting for county superintendent. No provision is made for furnishing poll books. We are not entirely clear from your letter as to what was done in the way of making returns of the voting, but we take it that tally sheets were used to make returns of the voting. If this was done, then the law was complied with. Your letter states that tally sheets were sent but that no poll books were sent out, and this would be in compliance with the statute.

CONCLUSION

It is, therefore, the opinion of this office that poll books are not required to be furnished to school districts for elections of county superintendents of schools,

Mr. Raymond H. Patterson

-4-

April 10, 1943

but that tally sheets are provided for use in making returns of the voting in such elections.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

HHK:HR

SHERIFFS: Commission for sale of more than one farm in a
single partition suit.

FEES:

* * * * *

July 23, 1943

Mr. W. C. Parker,
Sheriff
Marion County
Vienna, Missouri

7/27



Dear Sir:

We are in receipt of your recent request for an opinion which reads as follows:

"Would like some information in regard to fees of a sheriff in sales of real estate in partition. I have a partition sale on docket at the September Term of our Circuit Court in which there are five separate and distinct farms to be sold, located in various parts of the county. Will I be allowed my commission of 2% on the first \$1000, 1% up to \$5000 and $\frac{1}{2}$ % over that sum on each separate tract's sale price? Or will I only be allowed such commission on the gross sale of all five tracts? Of course these five farms are in the same suit but on the other hand I will have to auction them off separately and file addition reports of sale."

The writer is unable to find a case exactly in point with this inquiry. However, we are of the opinion that a careful examination of the wording of the statutes relative to your inquiry will reveal the correct answer.

It is well settled that no officer is entitled to fees of any kind unless provided by statute, and being solely a statutory right, statutes allowing same must be strictly construed. See State ex rel. v. Brown, 146 Mo. 1. c. 406.

July 23, 1943.

Section 1745, R. S. Missouri, 1939, provides the order of sale in a partition suit and reads:

"The order of sale to be made in pursuance of the provisions of this article shall not specify the day of sale; and the clerk shall, without delay, deliver a duly certified copy thereof to the sheriff, who shall in due time proceed to advertise and sell; and the sale shall take place during some day of the term of the court, and be governed by the same regulations prescribed by law for sales of real estate under execution, notice thereof being given in the same manner by the sheriff as provided by law for such sales: Provided, that where a tract or parcel of land is cut or divided by county lines, the sale of the whole thereof shall be made by the sheriff or commissioner in that county wherein the greater part of such land is situated; but in such cases he shall give notice of such sale in the other county by posting up at least five printed handbills in as many public places in such county."

Furthermore, Section 1747, R. S. Missouri, 1939, demands that farms to be sold in the same partition suit shall be sold separately and reads:

"If the premises consist of distinct buildings, farms, tracts or lots of land, they shall be sold separately; or when any tract of land or lot can be divided for the purpose of sale, with advantage to the parties interested, it may be so divided and sold in parcels."

The above provisions, in a way, lead one to believe that by requiring a separate sale of the farms, the commission allowed the sheriff for selling same should be computed on each separate and individual sale. However, we do not consider this to be true. A well established rule of statutory construction is that in construing an act all provisions of the act should be construed together and not merely pick out some remote provision and construe it alone. As stated in *Elsas v. Montgomery Elevator Co.*, 50 S. W. (2d), 1. c. 133:

July 23, 1943.

"Furthermore, all parts of an act should be made effective if possible so as to give it the wide applicability intended.

* * * * *

It is also the rule that statutes relating to the same subject must be read and construed together, and, if possible, harmonized. State ex rel. Central Surety Ins. Corp. v. State Tax Commission, 153 S. W. (2d) 43, 348 Mo. 17; State v. Brockington, 162 S. W. (2d) 860.

Section 1769, R. S. Missouri, 1939, provides what compensation shall be paid to the sheriff in making a sale in a partition suit and reads as follows:

"As a compensation for his services in making a sale of real estate under the provisions of this article, by order of court for the purpose of partition, the sheriff shall receive a commission on the amount of sales not exceeding two per centum on the first one thousand dollars, and one per centum on all sums over that amount and under five thousand dollars, and one one-half of one per centum on all sums over that amount."

The above statute specifically allows the sheriff, for making a sale of real estate under order of the court, for the purpose of partition, a commission on the amount of sales, not exceeding two per cent on the first thousand dollars and one per cent on all sums over that amount and under five thousand dollars, and one-half of one per cent on all amounts over five thousand dollars. If it had been the intention of the legislature to allow this commission on each separate farm and not upon the aggregate, it would have been an easy matter to have so worded the statute as to clearly convey such intention.

A primary rule of construction of statutes is to ascertain and give effect to the law-makers' intent, and this should be done from words used, if possible, considering the language honestly and faithfully. See Artophone Corporation v. Coale, 133 S. W. (2d), 1. c. 345. In view of Section 1769, supra, providing a certain stipulated commission on the amount of sales,

Mr. W. C. Parker

-4-

July 23, 1943.

as that word is used in the plural, it was evidently the intent of the legislature to compute the commission on the total sales of all farms included in the one partition suit, and not computed upon the sale of each individual farm.

CONCLUSION

Therefore, it is the opinion of this department that the sheriff in selling several farms in a single partition suit, the sale of the farms must be made separately, however, the sheriff's commission for selling the farms is based upon the total sale of all farms included in the one partition suit.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ARH:jn

PROBATE COURT: Probate Court may not charge fees for
FEES: denial of letters in estates consisting
DENIAL OF LETTERS: wholly of social security funds and in
which the assets are less than \$400.00.

Probate Court may charge fees to individuals in other estates
for denial of letters.

January 8, 1943

Hon. Jos. V. Pitts
Judge and Ex-officio Clerk
Douglas County
Ava, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you request an opinion from this department on the
question of probate fees in estates which contain assets
consisting of social security benefit funds and estates
not containing such security benefit funds in which
letters of administration are denied.

The two sections of the law which pertain to your
inquiry were passed in 1941.

Section 2, Article 1, Chapter 1, R. S. Mo. 1939,
as amended in 1941 (Laws of Missouri 1941, page 289)
provides as follows:

"The probate court, or judge thereof in
vacation, in its or his discretion, may
refuse to grant letters of administra-
tion in the following cases: first, when
the estate of the deceased is not greater
in amount than is allowed by law as the
absolute property of the widower, widow
or minor children under the age of eigh-
teen years: second, when the estate of the
deceased does not exceed one hundred
(\$100.00) dollars and there is no widower,

widow or children under the age of eighteen years, any creditor of the estate may apply for refusal of letters by giving bond in the sum of one hundred (\$100.00) dollars, said bond to be approved by the probate court or judge thereof in vacation, conditioned upon such creditor obligating himself to pay, so far as the assets of the estate will permit, the debts of the deceased in the order of their preference. Proof may be allowed by or on behalf of such widower, widow, minor children or creditor before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, or that the estate does not exceed one hundred (\$100.00) dollars when application is made by a creditor, the court or judge may order that no letters of administration shall be issued on such estate, unless, upon the application of other creditors or parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow, minor children, or creditor, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suit; provided also, that the widower, widow or minor children under the age of eighteen years may retain the property belonging to such estate and the creditor shall apply the proceeds thereof to debts of the estate in the order in which demands against the estate of deceased persons

are now classified and preferred by law. Provided further, that any person who has paid the funeral expenses or other debts of deceased shall be deemed a creditor for the purpose of making application for the refusal of letters of administration under this section and be subrogated to the rights of such original creditor."

(Underscoring ours.)

The underscored portions of this section are the amendments to the old act. This act was approved July 28th, 1941.

Section 9417 of the Social Security Act, Article 1, Chapter 52, R. S. Mo. 1939, as amended in 1941 (Laws of Missouri 1941, page 647) reads as follows:

"* * * Whenever any recipient shall have died after the issuance of a benefit check to him, or on or after the date upon which said benefit check was due and payable to him, and before the same is endorsed or presented for payment by the recipient, the Probate Court of the county in which said recipient resided at the time of his death shall, on the filing of an affidavit by one of the next of kin, or creditor of said deceased recipient, and upon the court being satisfied as to the correctness of said affidavit, make an order authorizing and directing such next of kin, or creditor, to endorse and collect said check, which shall be paid upon presentation with a certified copy of said order attached to the check and the proceeds of which shall be applied upon the funeral expenses and the debts of said decedent, duly approved by the Probate Court, and it shall not be necessary that an administrator

be appointed for the estate of said decedent in order to collect said benefit check. No costs shall be charged in said proceedings. Such affidavit filed by one of the next of kin, or creditor, shall state the name of the deceased recipient, the date of his death, the amount and number of such benefit check, the funeral expenses and debts owed by the decedent, and whether said decedent had any estate other than said unpaid benefit check and, in the event said decedent had an estate of a value of more than \$400.00 the provisions of this Act shall not apply and the estate of the decedent shall be administered upon in the same manner as estates of other deceased persons. * * * * *

This act was approved July 30, 1941. A comparison of these two sections reveals that they deal with estates of deceased persons which may be considered as one general subject matter. However, it will be noted that Section 9417, supra, as amended, deals only with estates in which there are social security benefit funds as assets. This would be classed as a special class of assets. This act was approved two days later than Section 2, supra, of the administrative law. The two sections might appear to be in conflict in part. However, the following rules of construction should be applied in such a case.

In State ex rel. McDowell v. Smith, 67 S. W. (2d) 50, 57, the court announced this rule of construction:

"It is the established rule of construction that the law does not favor repeal by implication but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as

to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.' * * * * *

Also, in State ex rel. v. Brown, 68 S. W. (2d) 55, 59, another rule of construction which might be applicable here was announced as follows:

"* * * In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' * * * * *

Applying these rules of construction to these two statutes, they should be considered together and both of them be construed as being in full force and effect, but

if there is any repugnancy in their provisions, then the special act, that is, Section 9417, should prevail over the general act, Section 2, supra.

From an examination of Section 9417 as amended, it will be noted that the purpose of this act was to relieve the old age security funds from any probate costs which might be incurred in connection with the administration and disposition of social security benefit funds which may be due to recipients of such funds. This section does contain the clause that its provisions shall not apply in assets which have a value in excess of \$400.00, but it does not attempt to include estates such as are mentioned in Section 2, supra, as amended, and which would not have as a part of their assets social security benefit funds.

Referring to Section 2, supra, of Article 1, Chapter 1, R. S. Mo. 1939, as amended, the underscored portions thereof being the amendments to the old law, it will be noted that this amendment was primarily for the purpose of permitting creditors of estates in which the assets are less than \$100.00, and where there is no widower, widow or minor children under eighteen years of age, to apply for refusal of letters, and for such creditors to pay the debts of the estates out of the assets so far as they will go. We fail to find any provisions in said Section 2, supra, as amended, which would prevent the probate court from making statutory charges for its services.

However, if there be a widower, widow or minor children who survive, they are entitled to certain statutory allowances, which allowances come ahead of any probate court costs in cases where letters are denied, or, in cases where they are not denied. This statement is supported by the holding of the St. Louis Court of Appeals in the case of Estate of Ulrici v. Johnston, 177 Mo. App. 584, 590:

"Woerner's Am. Law of Administration (2 Ed.), Sec. 86, pp. 176, 177, says: 'The right of the widow to the money or property allowed for her and her family's temporary support is held in some States to be absolute, and to vest at once upon

the husband's death' and cites in the note in support of the text *Hastings v. Myers*, 21 Mo. 519; *McFarland v. Baze*, 24 Mo. 156, holding that it passes at once upon the husband's death, discharged of the lien of the debts, and may be assigned by her by deed even without consideration, citing *Cummings v. Cummings*, 51 Mo. 261. In the more recent case of *Waters v. Herboth*, 178 Mo. 166, 172, 77 S. W. 305, the Supreme Court says that these sections of the statutes--that is, sections 114, 115, 116--give certain articles and \$400 to the widow. Moreover, the court says, 'Those sections were not designed to affect the final distribution, but the idea was to allow the widow to have those articles in the beginning. They were to be separated from the estate that was to be administered, to form no part of it, neither for the creditors nor the distributees; they were to be given to the widow in the first place, and it was only what was left after those articles were given to the widow that was to be treated as the estate to be administered.' (Italics are our own.) This language of the Supreme Court is conclusive to the effect that the absolute allowance to the widow became her property and formed no part of the estate to be charged with expenses of whatever kind. * * * * *

Also, in speaking of the allowance for the year's support, the court further said, at l. c. 591, 592:

"* * * In this view, the widow's allowance is to be preserved entire for her

use and support, and this, too, first from the expense of administration. Section 10 of the Administration Law (see Revised Statutes 1909) obviously contemplates this, for it provides that if the estate is no greater in amount than is allowed by law as the absolute property of the widow, administration shall be dispensed with entirely. It is certain that, under the established rule of decision in this State, the widow's allowances are regarded as her absolute property and not to be considered as assets of the estate. * * * * *

"Touching this question an accepted authority of high repute says, 'Since the property allowed to the widow is not, in most States, treated as assets of the estate, it would seem to follow that the widow is entitled to it in preference to creditors of any kind, whether for ordinary debts of the decedent, expenses of last illness, or even funeral expenses and charges for settling the estate.' * * * * *

From these statements it will be seen that the statutory allowances take priority over any charges for settling the estate.

In connection with the charge for granting or refusing letters, we are enclosing for your information copy of opinion to Mrs. Jessie B. Harrison, Acting Probate Judge of Dunklin County, Kennett, Missouri, dated February 20, 1942.

CONCLUSION

From the above we conclude, in estates where letters of administration are denied, that:

1. If the estate does not consist of assets in excess of the amount allowed by statute to the widower, widow, or minor children, then no probate costs may be taxed against it.

2. If the estate consists only of social security benefit funds and is valued at \$400.00 or less, then no probate fees may be charged against it.

3. If the estate consists of assets including social security benefit funds valued in excess of \$400.00, then probate fees may be charged against the estate subject to statutory allowances.

4. If the assets of the estate amount to less than \$400.00 and there is no widower, widow or minor children, and if the estate includes assets other than social security benefit funds, then the probate court expenses may be charged against it, provided no part of such charges may be imposed on any social security benefit funds in such estate.

5. No probate court charges for services may be made in estates consisting of social security benefit funds only and which are valued at less than \$400.00.

6. The probate court may make usual fee charges against individuals who request denial of letters in any estate which contains assets other than social security benefit funds, or, estates containing social security benefit funds valued at more than \$400.00.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

TWB:CP

COUNTY COURT: (1) County court only can purchase chemicals for use of courthouse and county farm; (2) County court cannot donate cash for repair on city streets; and, (3) County court should deduct five per cent Victory Tax from warrant drawn on county treasurer.

January 26, 1943

Honorable Charles A. Prather
Presiding Judge
Scotland County Court
Memphis, Missouri



Dear Sir:

Your request for an official opinion from this office, dated January 16, 1943, has been received.

Your first question is whether or not the janitor can, without an order of record by the county court, purchase, for the county, chemical supplies to be used for the courthouse and also the county farm.

Your second question is whether or not the county court can set aside an amount of money for the repair of city streets in the city of Memphis, which is the county seat of Scotland County, and also maintain all bridges in that city.

In your third question you inquire in what manner you shall handle the five per cent Victory Tax which applies to county officers, as well as other employees to whom salaries or wages are paid.

I

In answer to your first question as to the purchase of supplies by the janitor for the courthouse and county farm, we submit the following:

Honorable Charles A. Prather -2- January 26, 1943

Article VI, Section 36 of the Constitution of Missouri, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By reason of this section of the Constitution, the legislature enacted Section 2480 R. S. Missouri, 1939, which reads as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The above section specifically states " * * * shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; * * *."

In the last Federal decennial census, the population of Scotland County was 8557.

Under the County Budget Law, Article 2, Chapter 73, Revised Statutes of Missouri, 1939, counties having a population of over fifty thousand may provide for purchasing agents to purchase supplies, but that part of the Budget Law, mentioned above, and particularly Sections 10910 to 10917, both inclusive, of said Article, does not specify as to any particular person purchasing supplies, so we must revert therefore, to the general law.

It is true that there are decisions holding that certain officers could purchase necessary supplies. It was so held in Ewing v. Vernon County, 216 Mo. 681; Harkreader v. Vernon County, 216 Mo. 696, and Motley v. Pike County, 233 Mo. 42.

The three above cases were decided before the enactment of the County Budget Act.

Section 10912, of the County Budget Law, R. S. Mo. 1939, reads as follows:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested,

also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4." (Under-scoring).

Under this section it is specifically provided as follows:

" * * No officer shall receive any salary or allowance for supplies until all the information required

January 26, 1943

by this section shall have been
furnished. * * * * *

Section 10912, supra, refers to officers, and, under the County Budget Law, as above set out, unless the officer furnished the estimates of needs as therein set out, he would not be entitled to any payment for supplies he furnishes or purchases for his particular office.

Under the facts in your request the janitor, who was not an officer, but is merely an employee of the county court, made the purchase of the chemicals in question, and it goes without saying that such a purchase would be invalid, unless the county court ordered the janitor to make the purchase and such order is of record.

County courts, being courts of record, must show their acts by records. (Maupin v. Franklin County, 67 Mo. 327; Johnson County v. Wood, 84 Mo. 489, and Milan v. Pemberton, 12 Mo. 598.)

That the order of the court for the purchase of supplies must be of record was also held in the case of Carter-Waters Corporation v. Buchanan County, 129 S. W. (2d) 914, where the court said:

"This is an action, in ten counts, for the reasonable value of road materials shipped to defendant 'at the special instance and request' of its highway engineer, alleged to have been made with the approval of two judges of the county court. Upon trial before the court without a jury, there was a general finding

and judgment for defendant.
Plaintiff has appealed.

"* * * * *
Here, instead of the evidence
making a conclusive case for re-
covery, it wholly fails to show
any cause of action against the
county because it appears that
there was no order of the county
court made of record authorizing
the purchase; * * * * *."

CONCLUSION

It is, therefore, the opinion of this department,
that Scotland County is not liable for the purchase
of chemical supplies by a janitor, unless the county
court, by order of record, authorized the purchase.

It is further the opinion of this department,
that Scotland County is not liable under the contract
of purchase, even if made by the court itself, unless
the purchase is of record.

II

In answer to your second question, as to whether
or not the county court of Scotland County can turn over
cash to the city of Memphis, which is to be used for re-
pairs on the streets of that city, and for the maintenance
of bridges in the city, we submit the following:

Section 46, Article IV of the Constitution of Missouri, reads as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Section 47, Article IV of the Constitution of Missouri, reads as follows:

"The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: * * * * *"

In answering your question in regard to bridges, we are assuming that the bridges are city bridges and not county bridges.

The Supreme Court of this State, in construing Section 46, Article IV of the Constitution, supra, in the case of State ex rel v. Court, 142 Mo. 575, held that

an act authorizing a county revenue to be used in the repair of streets of incorporated cities, would be void.

CONCLUSION

It is, therefore, the opinion of this department, that the county court of Scotland County cannot deliver to the city of Memphis cash for the use of the city in the repair of the streets, or for the maintenance of all the city bridges.

III

Your third question is in regard to the procedure of handling the five per cent Victory Tax, which applies to county officers and other employees of the county.

Section 467, Title 26, of the Internal Revenue Code, as set out in U. S. C. A., reads as follows:

"(a) Collection of tax. The tax required to be withheld by section 466 shall be collected by the person having control of the payment of such wages by deducting such amount from such wages as and when paid. As used in this subsection, the term 'person' includes officers and employees of the United States, or of a State, Territory, or any political subdivision thereof, or of the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

"(b) Indemnification of withholding agent. Every person required to withhold and collect any tax under this part shall be liable for the payment of such tax, and shall not be liable to any person for the amount of any such payment.

"(c) Adjustments. If more or less than the correct amount of tax is withheld or paid for any quarter in any calendar year, proper adjustments, with respect both to the tax withheld or the tax paid, may be made in any subsequent quarter of such calendar year, without interest, in such manner and at such times as may be prescribed by regulations made by the Commissioner, with the approval of the Secretary."

Under that section it is specifically stated:

" * * by the person having control of the payment of such wages * * ."

The control of wages in the county is in the county court which draws the warrant for the employee, or officer, upon the county treasurer.

Under Section 468 of the same Act the withholding officer shall make a return and pay the tax withheld, on or before the last day of the month following the close of each quarter of each calendar year.

Under the procedure used in the State, under this Internal Revenue Act, known as the "Victory Tax," the state auditor withholds the amount due the government and makes the balance payable to the employee, or officer. The government is paid by check for the five per

Honorable Charlie Prather

-10-

January 26, 1943

Victory Tax drawn on the state treasurer.

We therefore suggest that the county court should break down the check or warrant to the employee, or officer, and, after deducting the five per cent Victory Tax, which is payable to the government, draw a separate warrant in favor of the employee for the balance to be drawn on the county treasurer.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY TREASURER:
FEES AND SALARIES:

Not entitled to fees on school
disbursement or levee district
account.

February 20, 1943

Mr. O. P. Preusser
County Treasurer
Perry County
Perryville, Missouri

2-27



Dear Sir:

This is in reply to your letter of February 12, 1943, which contains the following request for an opinion:

"I am writing for an opinion in regard to fees of County Treasurers.

"Is the County Treasurer entitled to fees on school warrants collected, and if there are other fees he can collect on, for instance, levee district accounts at settlement, which occurs twice a year."

The question involved in your request, is, whether or not you, as county treasurer, are entitled to fees on school warrants collected, and levee district accounts.

According to the last federal decennial census, the population of Perry County is 15,358.

Mr. O. F. Preusser

-2-

February 20, 1943

The section applicable to your compensation is Section 13800 Laws of Missouri, 1941, page 534, and reads as follows:

"The county treasurers of the several counties of this State (except counties under township organization) shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn by the county court upon the county treasury, the following sums: * * * * in counties having more than 15,000 inhabitants and not more than 20,000, the sum of \$2,200; * * * Provided that this act shall not apply to any county now or hereafter containing a city of not less than 70,000 or more than 200,000 in population, to be determined by the last federal decennial census. Provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding."

In the second proviso above set out, it is specifically stated that the salary shall be in lieu of any other or additional salaries, fees, commissions, or emoluments of whatsoever kind.

The above proviso is unambiguous, and the county treasurer can only collect his salary, and is not entitled to fees for the performing of duties incidental to the duties of office of county treasurer.

The fees on school warrants collected, referred to in your request, are mentioned in Section 10400 R. S. Missouri, 1939, which partially reads as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors * * * * *; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury."

Under the above partial section, it is the duty of the county treasurer to be the custodian of the moneys for school purposes, and he is allowed a certain per cent for the disbursement of the fund.

You also mention in your request, fees, in regard to levee district accounts. This fee is mentioned in Section 12471 R. S. Missouri, 1939, and reads as follows:

"County treasurers for receiving, receipting for, preserving and paying out funds of drainage and levee districts, shall receive one per cent of sums paid out."

The above two sections allowing fees to the county treasurer appear in the Revised Statutes of Missouri, 1939, but Section 13800, supra, was passed by the legislature in 1941, is an express repealing of Sections 10400 and 12471, supra, and is also a later act.

It has been held that where two statutes deal with the same subject matter, and are inconsistent with each other, so that both cannot be operative the latter act will be regarded as a substitute for the earlier one, and will operate as a repeal thereof, although it contains no express repealing clause. (Young v. Greene County, 119 S. W. (2d) 369).

The act of 1941, which places the county treasurer on a salary basis can be considered as expressly repealing all other acts allowing fees to the county treasurer for the performance of duties incident to his office.

All statutes should be strictly construed against the officers. (Nodaway County v. Kidder, 129 S. W. (2d) 857; Ward v. Christian County, 111 S. W. (2d) 182; Smith v. Pettis County, 136 S. W. (2d) 282.)

CONCLUSION

It is, therefore, the opinion of this department that the county treasurer is only entitled to his salary and is not entitled to fees on school warrants collected

Mr. O. F. Preusser

-5- February 20, 1943

and disbursed, or levee district accounts collected and disbursed, for the reason that such duties are incident to his office as county treasurer.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

CITIES, TOWNS AND VILLAGES: Authority of board of public
BOARD OF PUBLIC WORKS: works subject to board of
aldermen.

7336-1939

April 30, 1943

Honorable A. F. Pulliam
City Clerk
Sullivan, Missouri



Dear Sir:

We acknowledge receipt of your letter of April 13 last, requesting an opinion, which letter is as follows:

"The City of Sullivan established a Board of Public Works to look after the new established municipal light plant, in so doing do they have the power under the State law to collect the revenue and deposit same draw warrants or checks in payment of bills and salaries without going through the regular channels as other City bills and salaries are paid.

"In other words can they legally pay such bills and salaries without them being allowed by the city council, signed by the mayor and attested and signed by the city clerk and also failing to go through the city treasurer's hands.

"They have been proceeding as above and the question has come to the attention of the city council as to whether or not they had that power.

"Will appreciate very much if you can advise us on same."

In order to answer your question it will be necessary to discuss, first, the authority of municipalities, and,

second, the authority granted by statute to boards of public works and such additional powers as may be given boards of public works by ordinances duly passed by the cities creating such boards.

The first proposition is clearly answered in the case of *State v. McWilliams* (Supreme Court en banc 1934), 74 S. W. (2d) 363, 1. c. 364, as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' * * * * *"

Cities of the fourth class have the power to operate utilities through a board of public works. This question was discussed in *State v. McWilliams*, supra, at page 365 as follows:

"* * * Sections 7641, 7651, and 7661 of this article (Mo. St. Ann. Secs. 7641, 7651, 7661, pp. 6030, 6034, 6037) all confer on cities of the fourth class the power to erect, maintain, and operate waterworks, either by particularly designating such cities or by general inclusion. Consequently, there can be no doubt that the power has been conferred both by Constitution and statute on cities of the fourth class to erect, maintain, and operate waterworks. The crucial question in this case is: Has the Legislature prescribed the manner and method of the exercise of this power and does the record in this case show that relator has met those requirements?"

"The only legislative source of power cited by relator is section 7641, which merely confers the naked power on cities of the fourth class to erect or purchase and maintain and operate waterworks and to supply their inhabitants with water. Section 7651 also confers the same power, and further authorizes such cities to establish a 'board of public works.' The power to erect or purchase waterworks is also conferred by section 7661, as follows: 'The city council of any city of the first, second, third or fourth class in this state, or any city operating under a special charter, having three thousand inhabitants or more and less than one hundred and fifty thousand inhabitants shall have the power to erect, maintain and operate waterworks or to acquire waterworks by purchase as hereinafter provided, and to operate and maintain the same and supply the inhabitants thereof with water and to charge therefor reasonable rates as hereinafter provided.'"

All reference to section numbers in the above quotation is to Revised Statutes of Missouri for the year 1929.

Article 31, Chapter 38, R. S. Mo. 1939, entitled "WATERWORKS, LIGHT AND POWER PLANTS" and consisting of Section 7786 to Section 7823, inclusive, deals with the acquisition and operation of public utilities.

Section 7796, R. S. Mo. 1939, provides for the ownership of public utilities and for the establishment of boards of public works, and is as follows:

"Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have less than thirty thousand inhabitants, shall have power to erect or to acquire, by purchase or otherwise, maintain and operate, waterworks, gas works, electric light and

power plant, steam heating plant, or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system, public auditorium or convention hall, which are hereby declared public utilities, and such cities, towns or villages are hereby authorized and empowered to provide for the erection or extension of the same by the issue of bonds therefor, and any city, town or village which may own, maintain or operate, and which may hereafter acquire, by purchase or otherwise, and operate, or which may engage in the construction of any of the plants, systems or works mentioned in this section, is hereby authorized and empowered to establish, by ordinance, within such city, town or village, an executive department to be known as the 'board of public works,' to consist of four persons, electors of said city, town or village, who have resided therein for a period of two years next before their appointment, who shall be appointed by the mayor of such city, town or village, and confirmed by the common council in such manner as other appointive officers of such city, town or village are appointed and confirmed. The members of such board shall hold office for a term of four years each, or until their successors are appointed and qualified. Provided, that the members of said board shall hold office for a term of four years each, except the first incumbents, as members of said board of public works, who shall be appointed and hold office for the term of one, two, three and four years respectively."

Section 7799, R. S. Mo. 1939, provides further powers for such board:

"Whenever any such city mentioned in section 7796 shall have by ordinance established a board of public works, as herein provided,

such board so established in such city, town or village shall, during the existence of said board, have the power, and it shall be its duty, to take charge of and exercise control over any waterworks, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants."

Further powers for and duties of such board are provided for in Section 7800, R. S. Mo. 1939, as follows:

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

Section 7803, R. S. Mo. 1939, makes it the duty of the board to keep books of account and is as follows:

"It shall be the duty of said board to keep books of account, showing with en-

tire accuracy contemporaneous current entries of the receipts and expenditures of the board in such manner as to enable the same to be understood and investigated, and also to preserve on file in its office duplicate vouchers for all its expenditures, which books and duplicates shall at all times be open to the examination of the finance committee of the city council, or any other committee appointed by the common council, and such board shall make such reports of its business and transactions to the mayor and city council of such city, town or village as may be provided by ordinance."

Section 7821, R. S. Mo. 1939, provides for the selection of a depository for funds of water works systems and is as follows:

"There shall be selected a depository for the funds of the waterworks system in the manner as provided by article 5 of chapter 38, R. S. 1939, and all moneys received from water consumers shall be deposited daily by the manager of the said waterworks system, and all to be drawn out of such depository on warrants drawn upon said depository and signed by the president of the board of waterworks commissioners with the seal of the board attached, countersigned by the mayor."

Section 7818, R. S. Mo. 1939 provides as follows:

"All the provisions of sections 7786 to 7828, inclusive, which concern the purchase of waterworks shall apply, so far as the same are applicable, to the erection or purchase of electric light plants, gas plants, ice plants or other lighting plants."

The issue raised by your letter is centered upon the provisions of Section 7802, R. S. Mo. 1939, which is as follows:

"All bills of such board and all salaries of its employees shall be allowed and paid in the same manner that bills and salaries of other officers and employees of such city are allowed and paid."

Section 7802 originally appeared in an act passed in 1903, and Section 7821 originally appeared in an act passed in 1905. Apparently neither of these sections has been amended or re-enacted. The question is whether or not Section 7802 by the term "in the same manner" means that the common council or city council must approve and pay bills, or whether the bills must be approved and paid by the Board of Public Works in the same manner as bills and salaries are approved and paid by the city council. In statutory construction the phrase "in the same manner" was held in the case of Commonwealth v. Hildebrand, 139 Pa. Super. 304, 11 A 2d 688, to be applicable, not to substance, but only to procedure, and is the equivalent of "by similar proceedings, so far as applicable to the subject matter."

In the case of Brownfield v. Social Security Commission of Missouri (Springfield Court of Appeals 1941) 155 S. W. (2d) 905, the court held that under statute appeals from judgments in social security cases may be taken at any time within ninety days from the date of the judgment in the circuit court, since the statutory provision that appeals may be taken "in the same manner" as provided for appeals from the State Commission to the circuit court includes the time as well as other things to be done by the Commission to effectuate appeals from its orders to the circuit court. We quote from the opinion of the court as follows, l. c. 907:

"It must be conceded that all appeals must be provided for by statute, or no appeal is allowable. The time and manner of such appeal is also governed entirely by statute. It is the opinion of this

court that the General Assembly has provided for the time of such appeal when it said: 'Appeals may be had by either party from the circuit court upon the record in the same manner as provided herein for appeals from the State Commission to the Circuit Court.'

The above quotation has no direct bearing on our question except that it does demonstrate that the court recognizes the meaning of the term "in the same manner" as a reference term for the purpose of establishing procedure.

In the case of Wilder's S. S. and Co. v. Low, 112 Fed. 161, 1. c. 164, 50 C.C.A. 473, the court held that the phrase "in the same manner" has a well understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means "by similar proceedings, so far as such proceedings are applicable to the subject matter."

If Section 7802 is construed to mean that the term "in the same manner" means what the cases above cited seem to indicate, namely, that the board shall allow the bills and salaries by the same procedure as that used by the city council, then, under Section 7800, above quoted, which provides that the board "shall also exercise such other powers and perform such other duties * * * as may be prescribed by ordinance," the city council may authorize the payment of bills and salaries by passing proper ordinance. It seems to be contemplated that such authority will be given the board of public works by the language of Section 7821, above quoted, which provides that a depository shall be selected for the funds of the waterworks system and then provides that the warrants shall be signed by the president of the board and countersigned by the mayor.

In the case of State ex rel. and to the use of George B. Peck Co. v. Brown, 340 Mo. 1189, 105 S. W. (2d) 909, the court held that statutes, though seemingly in conflict, should be harmonized and force and effect given to each, since the legislature, in the enactment of subsequent statutes, will not be presumed to have intended to repeal earlier statutes, unless it has done so in express terms. Therefore, in enacting Section 7821 in 1905, providing for the issuance and signing of warrants, the legislature must have had before it Section 7802, which was then a law providing for the pay-

ment of bills and salaries. But where statutes are conflicting the court held in *Collins v. Twellman*, 344 Mo. 330, 126 S. W. (2d) 231, that the later statute, all else being equal, will take precedence over an earlier statute. In the case of *State v. Mangiaracina*, 344 Mo. 99, 125 S. W. (2d) 58, the court held that statutes relating to the same general subject matter should be read together and harmonized, if possible, with a view to giving effect to consistent legislative policy.

The question has been raised as to whether or not all of the facts above referred to apply to cities of the fourth class. We believe that this question was raised and definitely settled in the case of *Dobyns v. Bank of Ava* (Springfield Court of Appeals 1936), 99 S. W. (2d) 495. In deciding this case the court in effect held that all of Chapter 38 is construed together. Ava was a city of the fourth class and had failed to comply with the terms of what is now Section 7821, providing for the establishment of a depository. We quote from the opinion of the court at l. c. 497 as follows:

"There is practically no dispute as to the facts in this case; the only contention being as to whether section 7676, R. S. Mo. 1929 (Mo. St. Ann, Sec. 7676, p. 6046), is applicable and controlling in this case.

"We are of the opinion that section 7676, R. S. Mo. 1929, does apply and is controlling in this case, and applies to all cities owning and operating waterworks, under the provisions of article 31, chapter 38, R. S. Mo. 1929 (section 7641 et seq. (Mo. St. Ann, Sec. 7641 et seq., p. 6030 et seq.)). Section 7641, R. S. Mo. 1929 (Mo. St. Ann, Sec. 7641, p. 6030), which is the statute empowering cities to operate and own waterworks plants, states that 'the city council of any city, town or village in this state shall have power to erect, maintain and operate waterworks, or to acquire waterworks by purchase and to operate and maintain the same, and to supply the inhabitants thereof with water.' The right of a city to own waterworks plants is governed by article 31, chapter 38, R. S. Mo. 1929. This gives

any city, town, or village the right to operate a waterworks system, and therefore would apply to the city of Ava.

"Section 7676 is a part of chapter 38, article 31, and provides that the funds shall be deposited in a depository selected as provided by article 4 of chapter 38 (section 6719 et seq. (Mo. St. Ann. Sec. 6719 et seq., p. 5537 et seq.)). While it is true that article 4 of chapter 38 applies only to cities of the third class, and is not mandatory in its terms, however, article 4, chapter 38, R. S. Mo. 1929, is merely referred to in section 7676 to provide the method by which the depository must be chosen. Section 7676 makes it mandatory that a depository shall be selected. It states 'there shall be selected a depository for the funds of the waterworks system in the manner as provided by article 4 of chapter 38, R. S. 1929.' Undoubtedly section 7676 makes the selection of a depository mandatory on all cities, towns, and villages owning and operating waterworks, under article 31, chapter 38, and merely refers to article 4, chapter 38, to give the method and procedure to be followed, in selecting the depository.

"We are therefore of the opinion that, the depository not having been selected, in accordance with the statute, section 7676, which is a mandatory statute, the bank became a trustee ex maleficio, because the deposit was unlawful, * * * *"

Under this decision it is necessary that the terms of Section 7821 be complied with. It is possible that this section could be complied with by establishing the depository and when funds have accumulated that a warrant be drawn on the depository, signed by the president of the board and countersigned by the mayor, and payable to the city, thereby transferring the funds from the Board of Public Works depository to the city, and then allow the city to pay the bills. This

April 30, 1943

procedure probably should be followed in the event that an ordinance providing for the payment of bills by the Board of Public Works has not been enacted.

The sections above quoted give broad powers of control, management and operation to the Board of Public Works when established, and makes it mandatory that a depository be selected and provides for bonds to be given by the members of the board, and that books be kept and submitted to the city council. It is even required that the warrants be signed by the president of the board and countersigned by the mayor, and then provides for such other powers as may be prescribed by ordinance. It seems that Section 7802 does not make it mandatory that the bills be allowed and paid by either the board of public works or the city council, but if the board of public works, under proper ordinance, attempts to pay the bills and salaries, it is mandatory that they follow the same procedure as that followed by the city in the allowance and payment of bills and salaries.

CONCLUSION

It is, therefore, the opinion of this department that funds collected by the Board of Public Works from the operation of public utilities of the city must first be deposited in a depository, selected as provided in Section 7821, R. S. Mo. 1939, and, if proper ordinance has been duly passed by the city council, the Board of Public Works may then pay bills subject to the provision of said ordinance. If no ordinance providing for the payment of bills by the Board has been enacted then the funds may be transferred by warrant from the Board of Public Works' depository to the City Special Light Plant Fund. And, in this event, the bills would be allowed and paid by the City Council.

Respectfully submitted,

APPROVED:

LEO A. POLITTE
Assistant Attorney General

ROY McKITTRICK
Attorney-General

LAP:CP

TAXATION: The lien for taxes imposed on insurance on taxable property by the provisions of Section 11173 is applicable to the City of St. Louis and St. Louis County.

July 17, 1943

7/27

FILED 72

Honorable Lawrence Presley, Counsel
Insurance Department
Jefferson City, Missouri

Dear Mr. Presley:

This is in reply to yours of recent date wherein you submit the following statement and request:

"This Department has frequent inquiries as to whether the lien imposed by Section 11173, Revised Statutes of Missouri, 1939, upon the proceeds of insurance policies for tax liability applies to the City of St. Louis and St. Louis County and also the cities and towns located in St. Louis County. It appears to us that the lien imposed by Section 11173, supra, does not apply in these communities by virtue of Section 11201, R. S. Mo., 1939. The inquiries that have come to us to date are substantially in the following form:

- "1. A fire loss occurs in the City of St. Louis, Missouri, which is covered by a \$1000.00 insurance policy, and the loss exceeds \$500.00. Some State and City taxes are unpaid for the last two years. Do these taxes or any part of them become a lien upon the insurance money due under the policy?
- "2. A fire loss occurs in the County of St. Louis, Missouri, which is covered

by a \$1000.00 insurance policy, and the loss exceeds \$500.00. Some State and City taxes are unpaid for the last two years. Do these taxes or any part of them become a lien upon the insurance money due under the policy?

- "3. A fire loss occurs in Clayton, Missouri, in St. Louis County, which is covered by a \$1000.00 insurance policy, and the loss exceeds \$500.00. Some State and City taxes are unpaid for the last two years. Do these taxes or any part of them become a lien upon the insurance money due under the policy?
- "4. It would appear that under Section 11173 R. S. Mo. 1939, a lien attaches to the insurance money, but it also appears that this lien does not apply in the City of St. Louis and in St. Louis County under and by virtue of Section 11201 R. S. Mo. 1939. Does Section 11201 R. S. Mo. 1939 also repeal the Jones-Munger Law in so far as the cities or towns located in St. Louis County are concerned?"

Section 11201 R. S. Mo., 1939, to which you refer provides as follows:

"All sections or parts of sections in conflict with sections 11183 to 11199, both inclusive, shall be and the same are in so far as they conflict with these said sections or apply to counties and

cities not within a county herein described, hereby repealed, and specifically an act of the Fifty-seventh General Assembly, General Session, as found on pages 425 to 449 inclusive, Laws of Missouri, 1933, and amendments thereto, as they may apply to counties and cities not within a county which now have or may hereafter have a population in excess of 700,000 inhabitants and counties containing not less than 200,000 and not more than 400,000 inhabitants."

This section has been before the court in *Hull v. Bauman*, 131 S. W. 2d 721, and *Roberts v. Benson*, 143 S. W. 2d 1058, wherein its constitutionality was under consideration, but your question was not considered in those cases.

Section 11173 R. S. Mo., 1939, providing for collecting of taxes on property which has been destroyed by making such taxes a lien on the insurance on such property was Section 9965 by the Act of the 57th General Assembly, known as the Jones-Munger Act. This act was amended in 1935, Laws of 1935, page 402, but so far as your question is concerned the amendment did not change the situation.

Said Section 11201, supra, was enacted in 1939, Laws of 1939, page 878. From an examination of the title to this act and the act itself, and considering the purposes of the act it seems that the prime purpose was to take certain cities and counties therein described out from under the provisions of the portion of the Jones-Munger Act relating to procedure for collecting delinquent taxes and restore to them the old system of collecting delinquent taxes by suit. Section 11201 contains some language which might lead one to think that any portion of the Jones-Munger Act and its amendments which applies to cities and counties described in said section is repealed in so far as they ap-

ply to such cities or counties. However, from an examination of the title to the 1939 act which contains Section 11201, supra, it will be seen that the act only amended the Jones-Munger Act and repealed " * * all conflicting acts and parts of acts. * * " Since said Section 11201 is somewhat ambiguous on the question of whether or not it was the intention of the lawmakers to repeal all of the Jones-Munger Act which applied to the cities and counties described therein, or only that portion of the act which was in conflict with the 1939 act, then we can refer to the title of the 1939 act to ascertain its meaning. In *Holder v. Elms Hotel Co.*, 92 S. W. 2d 620, 104 A. L. R. 337, and *Meyer Co. v. Unemployment Compensation Commission*, 152 S. W. 2d 184, the court held that the title to the act may be considered as giving the legislative intention, if provisions contained in the body thereof are expressed in ambiguous language. The title to the 1939 act clearly indicates that it was the intention of the lawmakers to amend the Jones-Munger Act and repeal any portion of it or any other law which is in conflict with the 1939 act.

To give Section 11201, supra, a construction that all of the provisions of the Jones-Munger Act that apply to the cities and counties therein described are repealed would be making the provisions of Section 11201 broader than the title because the title only repeals the portions of the Jones-Munger Act that are in conflict with the 1939 act. Such a construction would make the section in violation of Section 28, Article IV of the Constitution, which requires the subject of the act to be clearly expressed in the title.

In the case of *State ex inf. Major v. Amick*, 152 S. W. 591, the court announced a principle which is applicable here. By this principle repeals by implication are not favored; and, where two statutes cover in whole or in part the same matter, it is the duty of the court to harmonize them, if possible, and so give effect to both as though they constituted one act.

Section 11173, supra, may be classed as a general statute and its provisions can apply with or without the Jones-Munger Act or the 1939 act, supra.

Hon. Lawrence L. Presley

-5-

July 17, 1943

CONCLUSION

Applying the foregoing provisions and principles it is the opinion of this department that the provisions of Section 11173 R. S. Mo., 1939, providing the manner of collecting taxes on insured property which has been destroyed, applies to all cities and counties in this state.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:PS

ELECTIONS:

CONSTITUTIONAL CONVENTION:

Clerk shall notify judges of their selection to act at election of delegates to Constitutional Convention.

----- March 8, 1945 -----

Mr. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you submit the following question:

"After the judges have been selected, as provided for in the case of a general election, how and by whom should they be notified?"

Under Section 11683, R. S. Mo. 1939, the judges of the election for delegates to the Constitutional Convention are selected in the manner provided by law for general elections. Under Section 11499, R. S. Mo. 1939, it is provided that judges for general elections shall be appointed by the county court. We do not find any statute directing the clerk of the county court to notify such judges of their selection, however, we think that the county court, under its inherent power, would have authority to direct the clerk of that court to send out notices of such selection.

The county court is a court of record, (Section 36, Art. VI of the Constitution of Missouri). Since an early day in the history of this state, the rule has been adopted and applied that every court of record has inherent power, independent of any statute, to make rules for the transaction of its business. *Risher v. Thomas*, 2 Mo. 98.

It is well known that it has been a practice of all county clerks to notify judges of election of their appointment. In the absence of a statute directing the clerk to give this notice, then the county courts may, by order, direct the service of such notice.

CONCLUSION

It is, therefore, the opinion of this department that the respective county courts may direct the county clerks to notify the judges of election of their appointment as judges for the Constitutional Convention election, and, under such order it is the duty of the clerk to give notice thereof.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

SHERIFF: Bond - County court liable for premium
on surety bond when approved by
county court.

April 6, 1943

4-21



Honorable Curtis J. Quimby
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request, under date of April 2, 1943, for an opinion relative to the question of whether or not a surety bond, given by a sheriff is governed by Section 3238 R. S. Missouri, 1939. You also suggest that since the bond of a sheriff is approved by the circuit judge, and not by the county court, that the county should not be liable where the sheriff elects to give a surety bond, under Section 3238, supra, and the county court approves said bond.

Section 3238 R. S. Missouri, 1939, partially reads as follows:

"Whenever * * * any officer of any county of this state, * * * shall be required by law of this state, or by charter, ordinance or resolution, or by any order of any court in this state, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."
(Underscoring ours.)

Honorable Curtis J. Quimby (2)

April 6, 1943

Section 13127 R. S. Missouri, 1939, reads as follows:

"Every sheriff shall, within fifteen days after he receives the certificate of his election or appointment, give bond to the state in a sum not less than five thousand dollars nor more than fifty thousand dollars, with sureties approved by the circuit court, conditioned for the faithful discharge of his duties; which bond shall be filed in the office of the clerk of the circuit court of the county."

Under Section 13127, supra, the sureties on a sheriff's bond must be approved by the circuit court. There is nothing said as to the giving of a surety bond in that section, and under Section 3238, supra, which is a later section, if the county court agrees to the giving of a surety bond by the sheriff then it is only necessary that the circuit court approve the surety.

The sheriff is a county officer. It was so held in the case of State v. Williams, 114 S. W. (2d) 98, Pars. 7-8, where the court said:

"A sheriff is indeed a 'public officer.' We hold he is a 'county officer' within the meaning of this section. The statements in State v. Finn, 4 Mo. App. 347 and State ex rel. Attorney General v. McKee, 69 Mo. 504, to the effect that a sheriff is a state officer are mere obiter dicta. In State ex rel. Holmes v. Dillon, 90 Mo. 229, 2 S. W. 417, we held that the words 'state officer' as used in the constitution were intended to refer to such officers whose official duties and functions are co-extensive with the boundaries of the state and were never intended to refer to a sheriff whose functions are confined to his county

and who is commonly known and called a county officer. We there distinguished the McKee case, supra. We again ruled that a sheriff is not a state officer in State ex rel. Bender v. Spencer, 91 Mo. 206, 3 S. W. 410, and approved the above holding in the Holmes case."

Section 3238, supra, was construed in the case of Motley et al. v. Callaway County, 149 S. W. (2d) 875, 1. c. 876. The court, in that case, in commenting on the section said:

"Public funds have long been used to furnish public officers with office space, stationery, postage stamps, and office supplies. The matter of furnishing bonds is surely analogous. A bond is 'in effect merely collateral security for the faithful performance' by an officer, a duty he owes the public in any event, in order to protect the public from loss. 22 R. C. L. 497, sec. 176. Personal bonds have many known disadvantages and deficiencies, which it is unnecessary to discuss here. The Legislature, no doubt taking notice of the results of some of these during recent depression periods, considered that surety company bonds could give better protection to public funds in the custody of public officers. It, therefore, authorized such a bond for county officers if the officer elected to furnish it and the county court approved it. It also recognized that to require an officer to pay the premiums therefor would have the effect of reducing his actual net compensation. So when consent and approval for the offi-

cer to purchase such a bond at public expense was given in advance by 'the public body protected,' it was required to pay the cost. No one has ever contended that payment of salaries to officers, instead of requiring them to collect fees from those to whom they render service, is not a public purpose. We see no difference in principle between the use of public funds in payment of officers' salaries and authorizing their use to pay bond premiums, instead of requiring the officer to pay these himself; or to beseech other private citizens to personally guarantee his faithful performance. It will not always be in the public interest to create a situation in which a public officer may be placed under greater obligations to certain private citizens (who furnish his bond) than to the public generally. At least, we think it is within the discretion and authority of the Legislature to say which is the best public policy. * * * * *

The 1937 Act only authorized the county to make an agreement for this type of bond, and, if it did so in advance, to pay for it when it was furnished. * * * * *"

Under the last quotation it specifically held that the 1937 Act, which is now Section 3238, supra, only authorized the county to make an agreement for this type of bond, and, if it did so in advance, to pay for it when it was furnished. The question as to who approves the bond is not in issue under this section. The only question is, whether or not the governing body, which in this case is the county court, makes an agreement for this type of bond. The bond of a county collector is partially approved by the state auditor, but, nevertheless, the county collector is a county officer, and, if the county court, upon the election of the county collector to give a surety bond, approves such a bond, they, as the governing body of the county are liable for the premium, providing the election and approval

Honorable Curtis J. Quimby

(5)

April 6, 1943

is made before the furnishing of the bond.

CONCLUSION

It is, therefore, the opinion of this department, that if a sheriff elects to give a surety bond instead of a personal bond with sureties approved by the circuit court, and the county court, which is the governing body of the county approves the giving of such a bond in advance, the county court will be liable for the premium.

It is further the opinion of this department, that Section 3238 R. S. Missouri, 1939 is only an act authorizing the county to make an agreement for the giving of a surety bond, and if it agrees to such a procedure in advance, to pay for it when it is furnished.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

SCHOOLS: Where pupils of a district not maintaining a high school attend high school in another district, under Sec. 10458, R. S. 1939, such district is legally obligated to pay tuition of such pupils even though they are orphans.

January 22, 1943



Mrs. Ada Reynolds
County Superintendent
Huntsville, Missouri

Dear Mrs. Reynolds:

We have your letter of the 20th, in which you submit the following request for an opinion:

"Will you please give me a ruling on the following:

A high school student from a rural school in Audrain County, whose mother is dead but whose father is living, is attending Clark High School in Randolph County.

The Audrain County school has refused to pay tuition, saying the boy is an orphan and entitled to attend any school in the state without paying tuition.

"As the Audrain County Superintendent and I have not agreed on the interpretation of the law, I felt it best to refer to you for settlement."

The question you submit evidently arises from different interpretations of Sections 10340 and 10458, R. S. Missouri, 1939. We shall, therefore, discuss these two sections.

Section 10340, in enumerating the powers of school boards, reads in part as follows:

" * * * They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same, except as provided for in Section 10458, R. S. 1939; Provided, that the following children, if they be unable to pay tuition shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: * * * * "

This statute clearly provides that the school board of a district cannot require tuition of orphans or children with only one parent living, who are unable to pay tuition, before allowing such children to attend the schools of the district. It should be noted that said section authorizes the school board "to admit pupils not residents within the district." This could mean nothing else than allowing pupils not resident in the district to attend the school or schools of the district. Tuition is a fee charged by one school district to allow someone to attend school therein who is not entitled as a matter of right to attend such school. The law (Section 10340) has seen fit to allow orphans and children with only one parent living, who are unable to pay tuition, to attend the school of any district in which they have a permanent or temporary home. Such children might have a home within a district and yet not be legal residents of such district, but in line with the general policy of the state to diffuse education as freely as possible, this provision has been made to remove any question as to the right of such children to have the advantages of free public schools.

It should be observed that the children provided for in said section are not privileged to attend any school they choose without paying tuition, but are permitted to attend

Jan. 22, 1943

only the school of the district in which they have a permanent or temporary home. The child involved in your case is not seeking to attend a school in the district in which he has a permanent or temporary home, but is seeking to attend (and is attending) a school of another district, that is, a school in a district in which he does not have a home. Therefore, the provisions of Section 10340 do not apply to him at all since he does not come within the class of children exempted from payment of tuition. So far as Section 10340 is concerned, the pupil you inquire about could be required to pay tuition to the Clark High School even though he were an orphan and unable to pay his own tuition.

However, the matter of tuition in the case you submit is governed by Section 10458 of the Statutes, which reads in part as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered;

* * * *"

We assume that the pupil you inquire about has completed the highest grade offered in his home district and that such district does not maintain an approved high school offering work through the twelfth grade. Such child is, therefore, entitled to attend an approved high school in another district of Audrain County or of any adjoining county. Randolph County adjoins Audrain County, and hence the pupil can elect to attend Clark High School of Randolph County.

Said Section 10458 puts the liability for the tuition for such pupil on the district of his residence, to-wit, the Audrain County school. Nothing is said in said section about a district not being liable for the tuition of an orphan child or of any other child, but said section plainly says that the district shall "pay the tuition of each and every pupil resident therein" who attends the high school of some other district of the same or an adjoining county. This provision would clearly include the pupil you inquire about.

Said Section 10458 provides a complete scheme for tuition and its payment. The Supreme Court of this State has so held. In the case of State ex rel. v. School District, 335 Mo. 803, 74 S. W. (2d) 30, 1. c. 33, the Supreme Court, in discussing this provision of the law, said:

"Now, although section 16 contains no express provision that a nonresident pupil shall not be required to pay tuition, it does provide a complete and apparently exclusive scheme for its payment. First, it unequivocally requires the district of residence to (*italics ours*) 'pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered.' * * * * *

A complete scheme for the payment of the tuition of nonresident pupils thus having been provided, we cannot escape the conclusion that it was intended to be exclusive and that respondents are without power to charge tuition in any other way.

* * * * *

CONCLUSION

It is, therefore, the opinion of this office that a school district which does not maintain an approved high school offering work through the twelfth grade is legally obligated to pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and who attends an approved high school in another district of the same or an adjoining county, even though such pupil or pupils are orphans or have only one parent living.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

HHK:HR

SCHOOLS:

School Board may contract with a Superintendent
of Schools, for more than one year.

1/5/44

FILED

74

December 17, 1943

Bertha Harrison Reed
Superintendent of Schools
Jasper County
Carthage, Missouri

Dear Madam:

This office is in receipt of your letter of recent date, in which you request an opinion concerning the power of a school board to elect a superintendent of schools for a period in excess of one year.

Omitting caption and signature, your request reads as follows:

"Again, Mr. McKittrick, may I ask for information?

"Is it within the legal jurisdiction of a school board to elect a superintendent of their schools for a period in excess of one year?"

Inasmuch as your request does not state whether this is a common school district, or one operating under a six-member board, we shall proceed on the theory that your inquiry was directed to the three man board.

The question raised in your letter has been one to which considerable discussion has been devoted. Due to the fact that there is no statutory prohibition preventing the employment of a superintendent for more than one year, some difference of opinion has developed concerning a situation where a board of directors has employed a teacher or superintendent for a period extending beyond one year.

Before discussing the question and interpreting the statutes and decisions as they apply, it will be both pleasant and profitable to review the statutes as they apply to the board of directors and their powers as enumerated by statute.

Turning to section 10420, R. S. Missouri, 1939, we find the qualifications of the board of directors. That portion of this section useful for our purpose reads as follows:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age. Said directors shall be chosen by the qualified voters of the district at the time and in the manner prescribed in section 10418 of this article, and shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, except those elected at the first annual meeting held in the district under the provisions of this chapter, whose term of office shall be for one, two and three years, respectively. ****"

Turning now to that section of the statute devoted to the power of the board to employ teachers, we find that section 10342 reads as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; * * * "

In construing this section, we find that the decisions require the contract with the teachers must be in writing, but that it need not conform to all of the formal requirements of the statute,

and we further find that where the offer and acceptance of the teacher and the board has been written into the minutes and signed by the clerk of the board, the contract is a valid one.

See Boswell v. District, 10, S.W. (2d) 665
Edward v. District, 297, S. W. 1001
Massie v. District, 70 S. W. 1108.

Looking now to that portion of our statute devoted to the construction of the teacher's contract, we find that at section 10343, R. S. Missouri, 1939, this language.

"The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby.* * *"

Directing our attention now to authorities, other than our own statutes and decisions, we find the general rule stated in clear and unmistakable language at 24 R. C. L. , 579:

"In the absence of an express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract if made in good faith and without fraudulent collusion binds the succeeding board. It has even been held that under proper circumstances a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole. The fact that the purpose of the contract is to forestall the action of the succeeding board may not of itself render the contract void. * * *"

The decisions within this state, bearing on the question under consideration, will be found in two

leading Missouri cases. We do not find that they have been overruled, modified or criticized and they express the feeling of our courts on this question.

In Tate v. District, 23 SW 2d. 1013, 1. c. 1021 and 1022, we find:

"* * * The prevailing weight of judicial authority on the subject is thus stated in 35 Cyc. 1079, 1080: 'In the absence of a statutory provision limiting, either expressly or by implication, the time for which a contract for employment of a school-teacher may be made to a period within the contracting schoolboard's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion, and for a reasonable period of time; and the succeeding board or officers cannot ignore such contract because of mere formal and technical defects, or abrogate it without a valid reason therefor.'"

"* * * The prevailing rule is sound, and is grounded upon good sense and reason. The contract of employment between plaintiff and defendant school district, here in controversy, cannot be held to be void or illegal for any lack of power or authority in the then board of directors of defendant school district to make such contract on December 18, 1924. The eight-month period of plaintiff's employment prescribed by said contract, occurring within the next ensuing school year, cannot well be said, as a matter of law, to be such an unreasonable or unusual period of employment as to bespeak, or to indicate, fraud in the making of the contract. The trial court rightly overruled the demurrer to plaintiff's petition, and rightly refused the peremptory instruction requested by defendant. The assignments of error respecting the aforesaid actions of the trial court must be denied.***"

The other leading case, *Aslin v. Stoddard County*, 106 S. W. (2d) 1. c. 476. In this case the pronouncement authorizes a county court to employ a court house janitor for a reasonable time, the performance of which would extend beyond the term of office of some of the members of the court. Quoting from this decision, Cooley, Commissioner, had this to say:

"We regard said case of *Manley v. Scott*, supra, 108 Minn. 142, 121 N. W. 628, 29 L. R.A. (N.S.) 652, as in point and as being soundly reasoned. The County court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs. * * *"

"In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold. * * *"

Bertha Harrison Reed

-6-

Dec. 17, 1943

CONCLUSION.

From the above and foregoing, we therefore, conclude that the board of directors of a common school district may contract with a superintendent of schools or a teacher for more than one year.

We further conclude that a contract, if it be for a reasonable time, and without fraud or collusion may extend beyond the term of office of some of the members of the board. The contract between superintendent and the board is not with the members of the board as individuals, but with the board as a continuing body.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

LIM:LeC

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

RECORDER OF DEEDS: Cannot charge for certified
CIRCUIT CLERK: copies of papers, but may
charge fifty cents for certificate.

February 9, 1943

Mr. Fred R. Rollins
Circuit Clerk and Recorder
Platte County
Platte City, Missouri



Dear Sir:

This is in reply to your letter of February 5, 1943,
which contains the following request for an opinion:

"Please advise as to the following
questions.

"Is it right for a Recorder of
Deeds to charge for making certified
copies of Marriage License,
if so how much, if not why not?

"Is a Recorder of Deeds on a
salary allowed to retain fees
for certified copies of any record
or filing, for example, certifying
Chattel Mortgages, identifying
notes.

"Is a clerk of the Circuit Court
on a salary allowed to retain fees
for certified copies of record or
filings, other than record of cases
out on Change of Venue? If so in
what form to collect and account
to the County."

Mr. Fred R. Rollins

(2)

February 9, 1943

Under the last decennial Federal census, the population of Platte County was 13862.

The salary of the circuit clerk of Platte County is governed by Section 13408 R. S. Missouri, 1939, which partially reads as follows:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum: * * * * * in counties having a population of ten thousand persons and less than fifteen thousand persons, the sum of seventeen hundred (\$1700) dollars; * * * * * in counties having a population of seventeen thousand five hundred persons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; in counties having a population of twenty thousand persons and less than twenty-five thousand persons, the sum of twenty-three hundred (\$2300) dollars; * * * * *

Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such

February 9. 1943

month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided: Provided further, that the clerks of the circuit courts shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venue from other counties:
* * * * *

Under the above partial section the salary of the circuit clerk of Platte County is Seventeen Hundred (\$1700.00) Dollars per annum. Also, under the above section, a circuit clerk, who is an ex officio recorder of deeds, must charge and collect all fees accruing to his office as recorder of deeds and pay monthly into the county treasury all fees so collected. Under this partial section the only fees that can be retained by the clerk of the circuit court are fees earned by him in cases of change of venue.

The fees of recorders of deeds are set out in Section 13426 R. S. Missouri, 1939, which reads as follows:

Mr. Fred R. Rollins

(4)

February 9, 1943

"Recorders shall be allowed fees
for their services as follows:

For recording every deed of
instrument, for every hundred
words.....\$0.10

In addition to the above fee for
recording deeds, they shall be
allowed for recording every such
instrument relating to real es-
tate, a fee of ten cents, as a
compensation for making and pre-
serving direct and inverted in-
dexes to every book containing
deeds affecting real estate.

For every certificate and seal... .50

For recording a plat of survey,
if not more than six courses... .40

For every course above six of
the same02

For copies of plats, if not more
than six courses..... .40

For every course above six..... .02"

In your request you ask if a recorder of deeds can
retain fees for certified copies of any record, etc.
After a thorough research of all the fee sections in
regard to a recorder of deeds, we find no authority
for a recorder of deeds to charge for certified copies
of records, except that he may charge fifty cents for
the use of his certificate and seal.

Mr. Fred R. Rollins

(5)

February 9, 1943

Under Section 13426, supra, the circuit clerk must charge and collect for the county, every fee accruing to his office under the provisions of Sections 13407, 13409 and 13410 R. S. Missouri, 1939.

We find no authority for a circuit clerk to charge for certified copies of a record, except copies that are specifically set out in Section 13407, 13409 and 13410, supra.

In order that a circuit clerk may charge for making any certified copies of any paper, he must place his finger on the statute authorizing it. It was so held in the case of Smith, Judge, v. Pettis County, 136 S. W. (2d) 282, 1. c. 285, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182.
* * * * *

Also, officers are required to perform their duties within the strict limits of their legal authority. It was so held in the case of Lamar Township v. City of Lamar, 261 Mo. 171, 1. c. 189, where the court said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way

they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority. (Underscoring ours.)"

CONCLUSION

It is, therefore, the opinion of this department, that a recorder of deeds cannot make a charge for making certified copies of marriage licenses, but may charge fifty cents for the use of his certificate and seal.

Mr. Fred R. Rollins

(7)

February 9, 1943

It is further the opinion of this department, that a recorder of deeds on a salary is not permitted to retain any fees, but must pay them monthly into the county treasury.

It is further the opinion of this department, that the clerk of the circuit court is not allowed to retain fees for certified copies of the record or filings, and if chargeable should be paid into the county treasury.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

ELECTIONS: The County Court may make any reasonable allowance to election Clerk for returning the poll books.

March 25, 1943

3/29



Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We are in receipt of your opinion request under date of March 24, 1943, which asks the following question.

"Would the Clerk of the election who transmitted the poll books to the office of the county clerk, be entitled to the same compensation as a messenger, as provided by that section of the statute, or does the County Court have in its discretion the power to allow him only 5¢ a mile necessarily traveled going and returning?"

Section 11496, R. S. Missouri 1939, provides:

"All judges and clerks of election shall be allowed such compensation for their services in conducting elections and returning the poll books and ballots to the county clerk's office, as the county courts of their respective counties may deem reasonable, not to exceed three dollars per day, to be paid out of the county treasury."

Under this provision the only test is whether or not the allowance of the County Court is reasonable. The allowance by the County Court of five cents a mile seems to be a reasonable allowance. That, however, is a factual question.

Honorable Marion Robertson

-2-

March 25, 1943

The only limitation imposed by the section, supra, is that the total compensation not exceed three dollars per day.

CONCLUSION

The County Court may make such allowance as is reasonable, for payment of election clerks, providing such compensation does not exceed three dollars per day. However, the statute does not set up any basis for computing the compensation of such election clerk who returns the ballots and poll books, but it is within the discretion of the County Court to arrive at the amount of such compensation on a mileage basis.

Very truly yours

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WCB:BAW

RECORDER OF DEED:

Certificate of title must be produced,
and fact of mortgage noted thereon be
satisfied to satisfy mortgage on motor
vehicle.

May 1, 1943



Mr. R. S. Rodgers
Clerk of the Circuit Court
Howell County
West Plains, Missouri

Dear Mr. Rodgers:

This will acknowledge receipt of your letter of April
21, 1943, which is as follows:

"Section 3488, Revised Statutes 1939, re-
lative to showing chattel mortgage on
certificate of title.

"As to release of chattel the section is
as follows, 'When such chattel mortgage
is released it shall be the duty of the
recorder to so show on the certificate of
title.' I have held that at the time
the note is presented for release of chat-
tel mortgage, the title certificate shall
be presented and we show release by pla-
cing the cancelling stamp across the show-
ing of the chattel mortgage on the face of
the title.

"The question has arisen.

"A trucking company secured a
loan from one of the Banks and
secured the loan by giving a
chattel mortgage on the trucks
belonging to the company and
certified the chattel mortgage
on eighteen (18) title certifi-
cates. The manager of the

trucking company has been very prompt about releasing chattel mortgages as soon as they are paid, so I called his attention to Section 3488 and told him as I understood the law he would have to present the eighteen titles at the same time he released the chattel mortgage. He did not agree with me and said he could make the releases at any time."

Section 3488 Mo. R. S. A., 1939, provides:

"It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. * * * * * A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided.* * * * *

Section 3488, supra, has a complementary provision in Section 8382 Mo. R. S. A., 1939, requiring every per-

son at the time he sells a motor vehicle to endorse on the title certificate a statement of all liens and encumbrances on the vehicle, but said provisions have nothing to do with the instant question.

Two things are to be noticed in Section 3488. First, the recorder is under no duty to certify the fact of the mortgage on the certificate of title unless requested to do so by the mortgagee; and second, unless the fact of the mortgage is certified on the title certificate, the mortgagee, in the event the vehicle is sold, has no enforceable lien on the motor vehicle as against a bona fide purchaser for value without notice of the lien. These provisions, in legal effect, correspond with the requirements on mortgages on property other than motor vehicles, which do not have to be filed with the recorder unless the mortgagee desires to do so, and if not filed, the mortgagee, in the event the property is sold, has no enforceable lien on the property as against a bona fide purchaser for value without notice of the lien.

The purpose of filing chattel mortgages is not to give the mortgagee a lien on the property as against the mortgagor, but to impart to the world notice of such lien, so that in the event the mortgagor should sell the property mortgaged without the consent of the mortgagee, then the mortgagee is protected and may pursue the property and have it sold to satisfy the debt of the mortgagor. Section 3486 Mo. R. S. A., 1939.

This view clearly shows that, in the case of a mortgage on a motor vehicle, it is the certification of the fact of the mortgage on the certificate of title, that is intended to prevent the lien of the mortgagee from being defeated by a sale rather than the filing of the mortgage with the recorder. This is because Section 3488 makes such certification constitute notice to the world of such

May 1, 1943

lien rather than the filing of the mortgage.

The purpose of satisfying chattel mortgages is to clear the record, in so far as notice to the world is concerned, as to the lien of the property mortgaged. In other words, filing of a mortgage on property, other than a motor vehicle, notifies the world of such lien, and satisfying the record withdraws such notice. Section 3489 Mo. R. S. A., 1939.

Therefore, such being the purpose of satisfying the record, it follows that satisfactions, in the case of a mortgage on a motor vehicle, requires that the record which imparts notice to the world of the lien, be the record satisfied. This record is the certification of the fact of the mortgage upon the certificate of title.

CONCLUSION

It is, therefore, our opinion that in satisfying the record of a mortgage on a motor vehicle, the recorder should require the certificate of title to be produced in order that the fact of the mortgage noted thereon, if such was noted thereon at the request of the mortgagee, may be satisfied.

In speaking of mortgages on motor vehicles in this opinion, it is understood, of course, that we are not dealing with the mortgages on motor vehicles excluded from the terms of Section 3488.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

LLB:FS

RECORDER OF DEEDS: Recorder of deeds cannot charge for duplicate certified copies of marriage licenses issued to a member of the Armed Forces.

January 11, 1943

Honorable John C. Ryan
Recorder of Deeds
Pettis County
Sedalia, Missouri



Dear Sir:

We wish to acknowledge receipt of your letter of January 4, 1943, which contained the following request for an opinion:

"Will you please give me an opinion on furnishing certified copies of marriage licenses for boys who are inducted into the army so that they can receive pay for their wives.

"There is a Statute, I believe, which states that any official shall furnish a certified copy of any instrument, that is a matter of record, for a veteran free of charge. My pay is only fees and I would like to know if this Statute applies to soldiers who are being inducted at this time.

"We are having a lot of calls for certified copies which we are not sure that they are being used for allotment pay and on one or two occasions we have had them send in for an extra duplicate copy. We also wonder if we could charge for these."

Section 15077 R. S. Missouri, 1939, reads as follows:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

In your request you state that the certified copies of marriage licenses for boys who are inducted into the Army are requested so that they can receive pay for their wives.

It is always a question of fact whether or not the certified records requested from your office are for the purpose set out in Section 15077, supra. If the request for the certified marriage license is for the purpose of receiving the allotment to be paid their wives, it would come within the following part of Section 15077, supra.

" * * * or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, * * * * * ."

January 11, 1943

This section does not, in any manner, refer to duplicate copies of the marriage license properly certified, and does not state that a fee should be charged for a second certified copy. We realize that in some cases a member of the Armed Forces may lose the certified copy of the marriage license, and may require another one, and, in view of the fact that no compensation is allowed for, " * * * a certified copy or copies of any public record in the State of Missouri * * * ", it is a matter to be taken care of by the legislature.

Where a public officer attempts to charge a fee on a statute where there is some ambiguity, the rule is that the statute is strictly construed against the officer. It was so held in *Smith v. Pettis County*, 136 S. W. (2d) 282, pars. 4-6, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. *Nodaway County v. Kidder*, Mo. Sup., 129 S. W. 2d 857; *Ward v. Christian County*, 341 Mo. 1115, 111 S. W. 2d 182. * * * * *

The general rule is that where a statute does not provide a fee or compensation to be paid to an officer, for performing part of his duties, the performing of the duties should be deemed to be gratuitous. It was so held in the case of *Nodaway County v. Kidder*, 129 S. W. (2d) 857, Pars. 5-8, where the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless

a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Euder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Section 15078 R. S. Missouri, 1939, reads as follows:

"Any person or persons violating any provision of section 15077 shall be deemed guilty of a misdemeanor."

Under this section it is a misdemeanor for a recorder of deeds to violate section 15077, supra.

Honorable John C. Ryan

-5-

January 11, 1943

CONCLUSION

It is, therefore, the opinion of this department that the recorder of deeds cannot charge a man inducted into the Army for certified copies of marriage licenses, or for duplicate certified copies of marriage licenses.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

WJE:RW

MOTOR VEHICLES: Transfer of ownership by corporation to partnership requires purchase of new license plates.

April 19, 1943

4/21



Ryland, Stinson, Mag & Thomson
Attorneys at Law
First National Bank Building
Kansas City, Missouri

Attention: Miss Jennie F. Cockrum

Gentlemen:

This will acknowledge receipt of your request for an official opinion under date of April 15, 1943, which reads:

"We represent Edward Aaron Company, a partnership, engaged in the business of processing poultry and eggs, which was formerly carried on by Edward Aaron Inc. The corporation was dissolved and has transferred all assets to the new company, the partners being the former stockholders of the corporation. Among the assets so transferred are several trucks and automobiles for which Edward Aaron Inc. secured 1943 Missouri license plates. They are now making application for new certificates of title covering these vehicles to be issued in the name of the partnership. Please advise whether or not it will be necessary for Edward Aaron Company to secure license plates for these vehicles in the name of the partnership or whether, in view of the fact that the same individuals own the vehicles, the licenses secured in the name of Edward Aaron Inc. may be transferred to Edward Aaron Company."

One of the purposes of registration and licensing motor vehicles is to regulate traffic and to know those

responsible for improper conduct of said motor vehicles. Section 75, 42 C. J., page 659 reads:

"The registration and numbering of motor vehicles is necessary to secure a proper observance of their duties on the highway and for the purpose of aiding in the detection of such vehicles and of those responsible for their movements and conduct, in case they fail to observe such duties, and the object of the license is to furnish a further guaranty that proper use of the vehicle will be made and that it will be operated in compliance with the law. Like other licenses, a license to operate a motor vehicle is a personal privilege granted to the licensee; and, in the case of a license to operate an automobile for hire, it is in the nature of a special privilege or right granted to the licensee. Since it is such a privilege, it is not transferable unless a transfer is authorized by the regulations, and is subject to revocation.

"An ordinary motor vehicles license, however, is not a license to do business as a transportation company as a common carrier. The former is a license or tax on the motor vehicle or rather on the privilege of operating the vehicle on the streets and highways, while the latter is not only a tax upon the privilege of using the highways but also an occupation tax on the business of the person or company operating the motor vehicles, although in some jurisdictions such a license fee or tax is not regarded as an occupation tax."

However, under Section 8382 (a) it is provided that upon the transfer of ownership of any motor vehicle the same number plates shall not under any circumstances extend beyond five days thereafter.

"Upon the transfer of ownership of any motor vehicle or trailer its certificate of registration and the right to use the number plates

shall expire, and the number plates shall be removed at the time of the transfer of possession, unless the seller shall give the buyer written permission to use such number plates for a period of five days, in which event the buyer shall have and display on demand of any proper officer said written consent of the previous owner. The buyer shall remove such number plates at the expiration of said five days, and return them to the previous owner of the motor vehicle, and it shall be unlawful for the buyer, or any person other than the person to whom such number plates were originally issued, to have the same in his possession after the expiration of such five days, whether in use or not: Provided, however, that in the case of a transfer of ownership the original owner may register another motor vehicle under the same number, upon the payment of a fee of \$2.00, if such motor vehicle is of horse power or tonnage not in excess of that originally registered; or upon the payment of a fee of \$2.00 and the difference between the fee originally paid and that due in case the new motor vehicle is of greater horse power or tonnage."

If this corporation were merely changing its name we might see some reason for not requiring new licenses as was stated in Thompson on Corporations, Volume 1, third edition, Section 71, page 76:

"It is evident that a mere change of the name of a corporation can have no effect upon its existence or identity, or upon rights and liabilities flowing either to or from it, a corporation being said to be one and the same entity notwithstanding the change of its name. The change in the name has no more effect on the identity of the corporation than a change in the name of a natural person has upon his identity. The mere change of a name does not create a new corporation. * * * * *

But here we have a corporation who, upon dissolution, transfers all assets to a new concern, a partnership, which is an entirely new

entity not similar in any respect to a corporation. Section 11, 18 C. J. S., page 389, distinguishes between a corporation and a partnership and holds that the two are essentially different concepts.

"There are several distinctions between a corporation and a partnership. (1) That a partnership is formed by mere agreement between the parties and rests solely on their common-law right to contract with each other, while a corporation may not be so formed, but as is explained in Sec. 23 infra, requires authority from the sovereign power or state. (2) While a corporation is a distinct legal entity, see Sec. 4 supra, in a partnership there is no legal entity separate and distinct from the members, but the partnership business is conducted, and the partnership property is owned, by the partners simply as individuals, and unless otherwise provided by statute suits are brought by and against them as individuals only. (3) A corporation possesses 'perpetual succession,' see Sec. 78 infra, while a partnership does not; that is to say, the members of a corporation may freely transfer their shares to outside persons, except so far as restrained from so doing by the terms of the charter or other constituent instrument, and thus introduce new members into the corporation in their stead, while in case of a partnership if a member retires from the firm or dies it works a dissolution, unless there is statutory provision to the contrary. (4) In the case of a corporation the members are not agents for the incorporated body, unless specially clothed with power as such; the shareholders act through a board which they create and cannot in general bind the corporation by their individual action, although all of them concur; in a general partnership, however, each member is an agent for the partnership with respect to all matters within the scope of the partnership business. (5) The members of a general partnership are individually liable for the debts of the firm, jointly and

severally; whereas, subject to statutory and special qualifications hereafter explained in Sec. 580, the members of a corporation are not so liable.

"An association cannot be either a corporation or a partnership at the election of the parties, but must be one or the other, for the law does not contemplate that partners may incorporate with intent to obtain the advantages of a corporate form and then become at will a partnership or a corporation as the purposes of their joint enterprise may require.

"Where the constitution expressly enumerates the purposes for which a partnership is to be regarded as a corporation, under the rule stated in Constitutional Law Sec. 21, a partnership is not a corporation for other purposes."

As stated in your request the new company, or partnership, is now making application for new certificates of title to said motor vehicles which indicates a change of ownership of said motor vehicles.

Section 8382, supra, provides that upon the transfer of ownership new license plates must be purchased. Certainly, it is conceded by all under these facts that the ownership has been transferred, the former owner, a corporation, no longer has any interest as a corporation to said motor vehicles, certificates of title are being secured by the new organization. Therefore, it is the opinion of this Department that the new partnership under the law is required to purchase new license plates for said motor vehicles.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

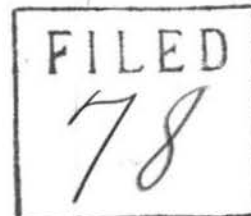
APPROVED:

ROY McKITTRICK
Attorney General of Missouri
ARH:EAW

SCHOOLS: School board cannot extend the number of hours of
a school day beyond six.

February 20, 1943

Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri



Dear Mr. Scantlin:

We have your letter of recent date in which you
submit for an opinion the following question:

"Would the rules and regulations of the board
of education, in extending the hours of school
work within the day and counting the overtime
as part of another day in order to shorten the
total number of calendar days that school
would actually be in session, be proper and in
conformity with the laws of this state?"

It has uniformly been held by the courts of
this country that the administration of public schools is
primarily a function of the State. In 56 C. J. 279, Sec-
tion 129, it is said:

"The management and administration of the
public schools and of the school system, like
their establishment and maintenance, is pri-
marily an affair of the state, and the legis-
lature has full authority, subject to consti-
tutional restrictions, to enact such laws as
it may deem necessary and expedient for the
proper administration and regulation of the
public schools and the promotion of their ef-
ficiency. All existing statutes relating to
the management and administration of the

schools should be construed together. * * * * "

The same policy has been followed in Missouri from the beginning of statehood. It is embodied in the Constitution of Missouri in Section 1, Article XI, which reads as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

It will be seen from the foregoing authorities that the management of the school system of this State is primarily the responsibility of the General Assembly. In line with this responsibility the General Assembly has passed many statutes regulating the school system of the state. One of those statutes is Section 10362 R. S. Mo., 1939, which reads as follows:

"The school day shall consist of six hours occupied in actual school work; the school week shall consist of five school days, except when Thanksgiving day, December 25, February 22 or July 4 shall fall upon a regular school day, then the four remaining school days, if taught, shall constitute a legal school week; the school month shall consist of four weeks, and the school year shall commence on the first day of July and end on the thirtieth day of June following."

By the foregoing section it would seem clear

that the General Assembly has definitely regulated the length of a school day. It has declared specifically that a school day shall consist of six hours occupied in actual school work. The General Assembly was within its rights in providing the length of a school day since such regulation would be a part of the administration and management of the public school system. No doubt the General Assembly took into account many factors in arriving at the proper number of hours which could be occupied with actual school work. They no doubt took into account the health of the students, the effectiveness of teaching for a longer period of time, the necessity of students getting to and from school during daylight and other factors which would naturally enter into a determination of how many hours should be spent in school in any one day. The language of Section 10362 is very definite and is mandatory.

We assume from your letter, however, that some contention is made that under the provisions of Section 10340 of the statutes the board of directors have authority to regulate the length of a school day. Said section reads in part as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district —
* * * * *

It is true that the General Assembly, subject to the Constitution, may delegate the management and administration of schools to local agencies such as school districts, municipal corporations, etc. The rule has been stated in 56 C. J. 280, Section 130, in the following language:

"Subject always to the provisions of the state con-

stitution, the legislature may delegate the management and administration of the public schools of the state to such subordinate agents or agencies as it may select or create, such as municipal corporations or boards of education or school directors or trustees, conferring upon them such powers and imposing such duties as it may see fit, and may at any time abolish an office or agency, and select or create new agencies to administer the school system. * * "

Our question, therefore, is to determine whether the General Assembly of Missouri has, by Section 10340, supra, delegated to the board of directors of a school district the power to prescribe the length of a school day. In other words, is prescribing the length of a school day one of the "needful rules and regulations for the organization, grading and government in their school district"?

In this connection it should be observed that if there is any doubt as to whether the Legislature has delegated power to a local board, the doubt shall be resolved against the existence of such power. In the case of Wright v. Board of Education, 295 Mo. 466, 246 S. W. 43, the Supreme Court was considering the power of a board of education to make certain rules and regulations under what is now Section 10340. In discussing that question the Court said (246 S. W., 1.c. 45):

"The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words

of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. * * * * *

In view of the fact that the Legislature has by Section 10362 set the length of the school day by positive law, we think that, to say the least, there is serious doubt as to whether the Legislature intended by Section 10340 to delegate that power to the board of directors.

We think it is clear that where the General Assembly has exercised its power to set the length of the school day, there is really nothing in that regard to delegate to the school boards. The Legislature has already controlled that part of the management of the schools and therefore subordinate agencies cannot act in that field. If there is a doubt as to whether the school boards have the power to set the length of day, that doubt would have to be resolved against the board having such power.

Furthermore, to contend that the power to prescribe the length of the school day is granted to school boards by Section 10340 it would be necessary to hold that such power is embraced in the grant of the general power to make rules and regulations for the organization, grading and government of schools. Section 10340 is a general statute giving to the school boards rather broad and indefinite powers. Section 10362 is a special statute dealing specifically with particular rules and regulations (assuming that the prescribing of the length of the school day is a rule and regulation). In that situation we are faced with the rule of statutory construction that where there is a general statute and a special statute dealing with the same subject matter, the special statute controls

over the general statute. This well established rule was recently restated in the case of State ex rel. McKittrick v. Carolene Products Co., 346 Mo. 1049, 144 S. W. (2d) 153, 156, in the following language:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Quoted with approval in the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S. W. 129, loc. cit. 132."

So it will be seen that even if Sections 10340 and 10342 deal with the same subject matter, to wit, the length of the school day, Section 10362 must prevail since it is a special statute.

The foregoing rule of construction requires that all statutes dealing with the same subject matter should be harmonized if possible so that all may be given effect. The rule has been stated in a somewhat different language in the case of Coates and Hopkins Realty Co. v. Kansas City Terminal Ry. Co., 328 Mo. 1118, 43 S. W. (2d) 817, 822, wherein the Court said:

" * * * * * 'All provisions of law on one topic should be considered in determining the meaning of any particular portion thereof * * * and such a construction should be given to the latter as will keep all the provisions of law on the same subject in harmony, and give effect to all when possible.' * * * * "

We believe that Section 10340 and Section 10362 can be harmonized so that both may be given effect and meaning. Section 10362 prescribes the length of school day, while Section 10340 leaves to the school boards the power to make rules and regulations as to conducting the school during the school day. Said sections do not conflict if such interpretation is given to them. One of them (Section 10362) declares the will of the General Assembly as to how many hours schools shall be conducted during the day, and the other (Section 10340) leaves the details of what particular part of the day shall be used to make up the six hours required by Section 10362. Under such construction the school boards would still have the power to make rules and regulations for the organization, grading and government of their own schools. By such construction of these two statutes meaning and effect is given to both, but to construe Section 10340 as vesting in the school boards the power to prescribe the length of the school day would be to ignore and render ineffective Section 10362.

CONCLUSION

It is, therefore, the opinion of this office that a rule and regulation of a school board undertaking to extend the hours of school work within the day beyond six hours for the purpose of counting the overtime as

Hon. Roy Scantlin

-8-

February 20, 1943.

part of another day and thereby to shorten the total number of calendar days that school would actually be in session would not be in conformity with the laws of this State.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

HHK:FS

SCHOOLS: Three questions as to validity of proceedings
under Section 10631 R. S. Mo., 1939.

February 26, 1943

Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri



Dear Mr. Scantlin:

We have your request for an opinion of recent
date which reads as follows:

"I desire an opinion from you relative to a
certain matter. The facts in the case seem
to be as follows:

"At Houston, Missouri, in Texas County,
a teacher was employed sometime last
summer. This teacher held a State
Certificate, which is in force now and
would continue to be in force until
July 1, 1944, issued by the State Su-
perintendent of Schools. This tea-
cher taught in the Public Schools of
Houston for several weeks and then at-
tempted to resign to take other em-
ployment. His resignation was unan-
imously refused by the Board of Educa-
tion. He was notified of the fact
that his resignation was not accepted
the morning after the action was taken.
However, the following Monday morning
he failed to report for duty. The
Board of Education of the Houston, Mis-
souri School District brought charges
against him asking that his certificate
be revoked under the provisions of Sec-
tion 10631 of the Missouri Statutes.

They presented these charges to the County Superintendent of Texas County, who then proceeded to set a date for the hearing. Said County Superintendent notified this teacher of the hearing, even notifying him of the exact time and place that the hearing would be held. In like manner, the County Superintendent notified the State Superintendent that charges had been filed against this teacher, and he also notified the State Superintendent the exact time and place of the hearing. The State Superintendent wrote the County Superintendent telling him that he felt that it should have been the duty of the State Superintendent to set the time and place for the hearing, but since the matter had gone so far as it had, perhaps the plans as set up by the County Superintendent should be carried out. The date arrived for the hearing; the State Superintendent was represented at the hearing by a deputy. The teacher against whom the charges were brought was present at the hearing, made no protest as to the method by which he was notified of the hearing, and, in fact, made no protest relative to any of the procedures as followed in the matter. The teacher whose certificate is in question made no denial of any charges which the School Board of Houston, had brought against him. It now becomes my duty to make a decision as to whether or not his state certificate should be revoked.

"I am quite willing to make such decision, if I can be satisfied concerning two or three small points in the case.

1. The County Superintendent set the time and place for the hearing and notified the teacher in question, the School Board of Houston, and the State Superintendent of Schools, telling each when and where the hearing would be held. Would the fact that the State Superintendent did not do this cause the proceedings to be improper?
2. Would the fact that the State Superintendent was represented in the hearing by a deputy rather than in person cause the proceedings to be improper?
3. In case you rule that the notification of time and place and the setting of the time and place should have been made by the State Superintendent of Schools, would the fact that the teacher in question was present at the hearing and made no protest of this matter at all, throw any different light on the matter?

"I am satisfied with regard to all other points in these proceedings, but I do humbly request an opinion on the above three points."

The statute involved in your questions is Section 10631, R. S. Mo., 1939, which reads as follows:

"The county superintendent may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract. All charges must be preferred in writing, signed and sworn to by the party or parties making the accusation, which must be filed with the county superintendent, and the teacher must be given due notice, of not less than ten days, an opportunity to be heard, together with witnesses. In case any person holding a certificate issued by the state superintendent, the board of curators of the state university, or the board of regents of any state teachers college, shall be complained of as herein provided for, then it shall be the duty of the county superintendent in the county where the offense is alleged to have been committed, to notify, in writing, the person or board issuing such certificate, and such person or board shall proceed as herein provided for the revocation of such certificate. The complaint must plainly and fully specify what incompetency, immorality, neglect of duty or other charge is made against the teacher, and if the county superintendent shall, after a hearing, revoke said certificate, the teacher shall have the right to appeal said hearing to the circuit court at any time within ten days thereafter by filing an affidavit and giving bond as is now required before justices of the peace. On any such appeal the judge of the circuit court shall, with or without a jury, at the option of either the teacher or the person making the complaint, hear the whole matter anew and decide the same de novo affirming or denying the action of the county superintendent,

and he shall tax the cost against the appellant if the judgment of the county superintendent is affirmed, but if he disaffirms such judgment, then he shall assess the costs of the whole proceedings against the person or persons making the complaint. Any teacher having his or her certificate revoked by any other authority than that of county superintendent shall have the right to appeal therefrom to the circuit court and shall have the right to a like hearing and trial as is herein provided for in the appeal from the decision of the county superintendent."

It will be seen by the foregoing section that where the certificate of the teacher complained against has been issued by the State Superintendent of Schools, that official should conduct the hearing on the complaint. The statute says that upon complaint being made against a teacher holding a certificate issued by the State Superintendent of Schools, the State Superintendent of Schools should proceed as provided in said section, that is, should proceed in the same manner that the county superintendent would proceed were the complaint lodged against a teacher holding a certificate issued by him. Such procedure would include the setting of a date for hearing and the furnishing of notice to the teacher complained against. These steps should be taken by the State Superintendent of Schools when he is to conduct the hearing. However, the facts in the present case show that although the county superintendent set the date of the hearing, the state superintendent ratified and approved of said date so that in reality the state superintendent did set the date on which the hearing was to be held. We think that the ratification or adoption by the state superintendent of the date set by the county superintendent was just as effective as if the state superintendent had originally set the date.

Likewise, although the state superintendent should have notified the teacher complained against, yet the teacher did receive a notice of the charges and of the time and place of hearing and actually attended said hearing without making any protest as to the manner in which he was notified. We believe that the teacher thereby waived any defect of notice since the purpose of the notice was to advise him as to the fact that charges had been lodged against him, as to what said charges were and that on a day certain a hearing would be held upon said charges, at which hearing he could be present and be heard. By being present at the hearing after he had received notice of the nature of the charges we think he could not then complain that he had not been properly notified.

The foregoing disposes of questions one and three of your request. Question two presents a different situation, however. Your statement of facts shows that the state superintendent did not attend the hearing on the complaint, but that he sent someone else in his place to the hearing. Your statement of facts says that "the State Superintendent was represented at the hearing by a deputy".

There is no deputy state superintendent of schools. The question, therefore, resolves itself to a question of whether the state superintendent can deputize someone to attend to certain of his duties. The general rule as to when a public officer can delegate his powers to someone else is stated in 46 C. J. 1033, Section 291, as follows:

"An officer, to whom a discretion is intrusted, cannot delegate the exercise thereof, but ministerial duties, except where there is a statutory prohibition, may be delegated."

The foregoing rule has been followed in Missouri as will be seen by the case of *State ex rel. v. Reber*, 226 Mo. 229, 237, wherein the Court said:

" * * * * * An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion. *
* * * * "

To answer your question, therefore, we must determine whether or not the powers vested in the State Superintendent of Schools under Section 10631 of the statutes require the exercise by that official of discretion and judgment or whether such powers merely call for an exercise of ministerial duties by such officer.

The distinction between duties requiring the exercise of discretion and judgment and those requiring the performance of mere ministerial functions has been well established by the courts of this State. In the case of *State ex rel. v. Cook*, 174 Mo. 100, 107, the Supreme Court with approval quoted the following statement as to the distinction between powers requiring the exercise of discretion and those which merely require the exercise of ministerial duties, which statement reads as follows:

" * * * * * In *Ex parte Thompson*, 52 Ala. 98, the rule is stated thus: 'When the power is clearly defined and enjoined, does not involve the exercise of discretion or judgment, and no alternative is left to the officer charged with its execution; when he must act

without enquiry, and without evidence, and the mode of action is expressly declared, the power is purely ministerial. When, however, the power involves the exercise of judgment and discretion; when it is to be exercised only in an ascertained event, and on the occurrence and existence of particular facts, and the officer charged with the execution of the power must determine whether the event has arisen, or the facts exist requiring its exercise, then the power is judicial, or in its nature judicial.'

* * * * *

The rule as to such distinction is stated in the case of *State ex rel. v. Meier*, 143 Mo. 439, 447, in the following language:

" * * * * * 'A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.' *Merrill on Mandamus*, sec. 30; *Marcum v. Com'rs*, 42 W. Va. 263, and cases cited."

Again in the case of *State ex rel. v. Welsch*, 124 S. W. (2d) 336, 1.c. 339, the Court defined a ministerial act in the following language:

" * * * * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts be-

ing shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. State ex rel. Jones et al. v. Cook, 174 Mo. 100, 118, 119, 120, 73 S. W. 489."

See also the case of State ex rel. v. Brown, 72 S. W. (2d) 1. c. 862.

With these rules in mind let us examine Section 10531, supra, to see what is the nature of the duties of the state superintendent with respect to revocation of certificates. It should be noticed in the first instance that the statute says that the official vested with the power to revoke "may revoke, upon satisfactory proof, any county certificate for incompetency, immorality, neglect of duty, or the annulling of written contracts with the board of directors without the consent of the majority of the members of the board which is a party to such contract." The statute also specifically requires that the teacher complained against must be given an opportunity to be heard and to present witnesses in his behalf. It will be seen, therefore, that the superintendent hearing the complaint does not have to revoke a certificate but he "may revoke" the certificate. He not only must exercise his judgment in ascertaining the existence of particular facts, but he must also exercise his discretion as to whether the certificate should be revoked even if certain facts are found to exist. He necessarily must exercise his judgment as to the credibility of witnesses and as to the weight and value which should be given to their testimony. He, therefore, exercises powers which are in their nature judicial, as was said in the case of State ex rel. v. Cook.

It cannot be said, therefore, that the powers of

of the superintendent, under Section 10631, merely require the exercise of ministerial duties. Such official is not bound by law to revoke a teacher's certificate regardless of his own opinion as to the propriety or impropriety of such revocation in a particular case. It is quite possible, perhaps probable, that in some cases the superintendent might revoke a certificate upon a showing of facts but might not revoke a certificate upon a showing of the same facts in another case. There might be extenuating circumstances in one case which would not be present in another case. In any event, the superintendent would be the judge as to whether he should revoke the certificate in each particular case.

The state superintendent could not exercise his judgment and discretion as to whether a teacher's certificate should be revoked without hearing the evidence and personally acquainting himself with the facts upon which the determination is to be made. To allow someone else to conduct the hearing, view the witnesses, hear the evidence and make a finding as to what the facts were would be a clear delegation of the duties which the law requires the state superintendent himself to perform. A deputy might conclude that some witness had sworn falsely whereas the superintendent, if he should hear the same witness, might conclude that the witness was telling the truth. Likewise, a deputy might conclude that a teacher was guilty of incompetency, immorality or neglect of duty, or vice versa, whereas the superintendent himself might arrive at a different conclusion should he hear the same evidence. The law has placed upon the superintendent the responsibility for a determination of the facts and of the question as to whether a certificate should be revoked under the facts as determined. Under the rules as laid down by the courts in the cases above quoted from, such official cannot delegate that responsibility.

Hon. Roy Scantlin

-11-

February 24, 1943

Furthermore, the law requires that an officer perform his duties in the manner prescribed by law. The rule has been stated as follows in 43 C. J. 1033, Section 290:

"Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity.
* * * * *

Under the facts set out in your letter the state superintendent attempted to exercise his powers in a manner different from that prescribed by law in that he undertook to delegate to someone else (a deputy) the power and responsibility of exercising judgment and discretion which was required of the superintendent himself. Since the teacher in question has not been accorded a hearing by the State Superintendent of Schools, the State Superintendent of Schools is without authority now to revoke the license of such teacher. Nothing said herein should be construed to mean that the state superintendent cannot yet conduct the hearing as required by law and take such action as in his judgment the facts warrant.

CONCLUSION

It is, therefore, the opinion of this office that under the facts and circumstances set out in your letter of the fifteenth (1) the setting of the date of the hearing by the county superintendent and the approval

Hon. Roy Scantlin

-12-

February 26, 1945

or ratification of said date by the state superintendent was a substantial compliance with Section 10631 R. S. Mo., 1939, and (2) that the fact that the State Superintendent of Schools did not personally conduct the hearing but undertook to be represented at said hearing by another person rendered the proceeding void and of no effect and (3) that the fact that the teacher in question was present at the hearing and had been notified of the nature of the charges against him and of the date said hearing would be held and did not protest as to any deficiency of notification amounted to a waiver by the teacher of any defect in the time and place of the hearing and of the fact that he had not been notified by the proper official.

Respectfully submitted,

HARRY H. KAY

Assistant Attorney-General

APPROVED:

ROY MCKITTICK
Attorney-General

HHK:TS

SCHOOLS: School district in order to qualify for central high school building aid must erect building on tract of not less than five (5) acres subject to approval of plans by State Superintendent of Schools.

July 12, 1943



Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri

Dear Mr. Scantlin:

This will acknowledge receipt of your letter of recent date in which you request an opinion based on the following:

"This Department has received an application for state aid for a central high school building as provided in Section 10499, R. S., Mo., 1939.

"The Board of Education of the Kidder School District No. 8 of Caldwell County; in its application for the high school building aid, has certified that it has purchased a tract of ten acres of contiguous territory and secured thereon a building which is suitable for a central school, containing one large central building, with separate gymnasium and auditorium which include a modern system of heating, ventilation and lighting. The Board of Education further certifies that the total value of the buildings and site was \$75,500.00, and that the Board actually paid \$5,500.00 for the Kidder College site and buildings. The buildings on the site were erected in 1927. State building aid of \$2000.00 is requested by the Board of Education.

"The newly acquired school site and buildings herein described is the pro-

perty formerly owned by the Kidder College which was a private school. The buildings all seem to be in good condition and constitute a modern and excellent school plant adequate for this district.

"Section 10499, R. S., Mo., 1939, in part, provides that town or consolidated school districts may qualify for the central high school building aid when the following conditions are met:

- "1. Secure a school site of not less than five acres for the central high school building.
- "2. Erect thereon in accordance with plans and specifications approved by the State Superintendent of Schools a building suitable for a central school and containing one large central school, one large assembly and a modern heating and ventilating system.
- "3. That the state shall pay one-fourth of said building and equipment cost, provided that the amount paid shall not exceed \$2000.00.

"The question arising in connection with this application for building aid is whether or not the school district may qualify for the state building aid when the Board of Education purchases the school site with school buildings thereon in lieu of erecting new buildings on the required school site.

"I shall appreciate your advice and official opinion in answer to the following questions:

"1. Does Section 10499, R. S. Mo., 1939, require the actual erection of the new and approved school building on the required site before any district could qualify for the state central high school building aid?

"2. Would the Board of Education comply with the law in qualifying for the state building aid when the school site and completed buildings meet the required specifications for approval?

"3. Would the Kidder School District No. 8 qualify for the maximum \$2000.00 building aid when the actual cost of such property to the district was only \$5,500.00, even though the original cost of the site and erection of the buildings in 1927 was \$75,500.00?"

The statute which concerns itself with the state aid a school district may obtain is found at Section 10499 R. S. Mo., 1939, which reads as follows:

"Whenever a district organized under the provisions of this article has secured a site of not less than five acres for the central high school building of said district and has erected thereon a school building, suitable for a central school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and

ventilating, the state shall pay one-fourth of the cost of said building and equipment: Provided, the amount thus paid by the state shall not exceed two thousand (\$2,000.00) for any one district. The state of Missouri shall, out of the general revenue fund of the state, make adequate appropriation for carrying out the provisions of this section and the money due any district shall be remitted by the auditor to the county treasurer of the proper county on receipt of a certificate from the state superintendent of public schools stating that the conditions herein prescribed has been complied with." (Emphasis ours)

In order to construe the terms used in the statute it will be necessary to refer to other authorities for a definition of the word "erect." Funk and Wagnall Standard Dictionary of the English language, 1937 Edition, defines "erect", "To rear or set up, as a building, build." "To construct or establish."

Ballentine's Law Dictionary, 1930 Edition, defines "erect" as:

"While ordinarily 'to erect' has a different meaning from the word 'to move,' it is not true that to erect a building means the present construction and adjustment of its component parts to the smallest detail. Thus, the construction of the foundation, supports, or driveways for the building in its new location would be pro

tanto an erection of the building.
See Red Lake Falls Milling Co. v.
Thief River Falls, 109 Minn. 52, 24
L. R. A. (N. S.) 456, 458, 122 N. W.
Rep. 872."

Webster's New International Dictionary, 1940 Edition:

"To raise, as a building; to build;
to construct; * * * * *

Bouvier's Law Dictionary, 1934 Edition, defines "erec-
tion" as follows:

" * * * * The repairing, alteration,
and enlarging, or the removal from
one spot to another, of a building,
is not erection within the meaning of
a statute forbidding the erection of
wooden buildings; 27 Conn. 332; 2
Rawle 262; 51 Ill. 422. The moving
of a building is not an erection of a
building; 121 Mass. 229; * * * * "

Directing your attention to 21 C. J. 819, this autho-
rity has the following to say concerning the word "erect":

"The word, in its narrowest signifi-
cation, means to build; to build up;
to construct; to raise; to raise
up; to raise and set up in an up-
right or perpendicular position; to
rear or set up; to set up; to lift
up; but by context, it also means
to establish; to institute; to

July 12, 1943

found, form, frame, etc. In a broad sense the term may mean to create a particular thing out of its parts. The authority to erect may carry with it certain incidental or implied powers in connection with the erection, such as the power to remove, to purchase, or to do something reasonable or necessary in connection with the erection or its maintenance and preservation.

"Erected. Actually constructed; built; completed.

"Phrases: In the present tense, 'construct and erect,' 'erect a free school-house,' 'erect any buildings therein' 'erect, complete and have ready for operation,' 'erect in any street,' 'erect or cause to be erected,' and 'erect works for refining.' In the past tense, 'erected into a police village,' 'erected, made, or set up,' 'erected or built,' and 'erected under one general contract.' As a participle, 'erecting a building. . . for business purposes,' 'erecting and endowing of an hospital,' and 'erecting or building of any house.'"

And also in 21 C. J. at page 820, we find this paragraph:

"ERECTION. The term, as used with reference to building, means the putting together of the materials that are used therein; putting together the necessary material and

July 12, 1943

raising it; the putting together of the brick and mortar, wood, and other materials making the construction; construction. It may imply some structure superimposed on the land.

"Phrases: 'Erection, alteration, or repair of buildings and structures,' 'erection and improvements,' 'erection, construction and completion of school buildings,' 'erections for manufacturing purposes,' 'erection of any building,' 'erection of improvements,' 'erections or additions,' 'erection or inclosure,' and 'erections or encumbrances.'"

Looking now to 15 Words and Phrases, 95, 96, on the subject of erection, we find these definitions:

"One of the primary definitions of the word 'erect' is 'to raise, as a building; to build, to construct.' Butz v. Murch Bros. Const. Co., 97 S. W. 895, 897, 199 Mo. 279, quoting Webst. Dict.

" * * * * *

"The term 'erection,' used with reference to building, means the putting together of the materials that are used therein, the putting together of the brick and mortar, wood and other materials making the construction. Scharff v. Southern Illinois Const. Co., 92 S. W. 126, 130, 115 Mo. App. 157.

" * * * * * State ex rel. City of
Chillicothe v. Gordon, 135 S. W. 929,
931, 233 Mo. 383.

" * * * * *

" * * * * * McGary v. People, N. Y., 1
Cow. Cr. R. 338, 343."

Turning now to 30 C. J. S. 1133, 1134, 1135, we find,
under "erect" and "erection", the following:

"Present Tense

"The word, in its narrowest signifi-
cation, means to build, construct,
lift up, raise, raise and set up in an
upright or perpendicular position,
raise up, or to set up; but by context
it also means to establish; to insti-
tute; to found, form, frame, etc.; and
so in a broad sense the term may mean
to combine materials so as to consti-
tute the structure, or to create a par-
ticular thing out of its parts. The
authority to erect may carry with it
certain incidental or implied powers in
connection with the erection, such as
the power to do something reasonable or
necessary in connection with the erec-
tion or its maintenance and preservation,
also the power to purchase or to remove.
Specifically applied to a public struc-
ture, the term implies the furnishing and
equipping of the building, and may be
synonymous with 'equip' and 'furnish';
and in general, it is frequently used
interchangeably with 'construct' see 16
C. J. S. p 1509 note 29. It has been
compared with, and distinguished from,

'build' see 12 C. J. S. p 377 note 25,
'construct' see 16 C. J. S. p 1509
note 40, 'establish,' and 'move.'

"Phrases employing the word are set
out in the note. Other phrases for
which recent adjudications have not
been found see 21 C. J. p 820 notes
45-51.

"Erected

"Actually constructed; built; com-
pleted.

"The term has been held synonymous with
'constructed' see 16 C. J. S. p 1509
note 38, and 'established.' It has
been compared with, or distinguished
from, 'built' see 12 C. J. S. p 378
note 58, 'completed' see 15 C. J. S. p
665 note 4, 'constructed' see 16 C. J.
S. p 1509 note 46, and 'made.'

"Phrases employing the word are set out
in the note. Other phrases see 21 C.
J. p 820 notes 52-55.

"Erecting

"Generally, when applied to building
construction, the term excludes alter-
ing, remodeling, or repairing, unless
these processes amount in fact to the
erection of a new building; but some-
times, although not always, it may in-
clude 'remodeling' and may even be sy-
nonymous therewith.

"Phrases employing the word are set out
in the note. Other phrases see 21 C. J.

p 820 notes 56-58.

"ERECTION. The term, as used with reference to building, means construction, putting together the necessary material and raising it; the putting together of the brick and mortar, wood, and other materials making the construction, or the putting together of the materials that are used therein. It may imply some structure superimposed on the land. In the subjoined notes examples are given of what, under particular circumstances, the term has been held to include, and not to include.

"In common parlance, the erection of a building and the alteration or remodeling of one already existing are distinct and different things; but under particular circumstances, especially where there is a radical reconstruction of a building or the construction of a substantial addition thereto, 'erection,' used in a broad sense, may be equivalent to 'remodeling'; and also, depending on the circumstances of its use, the word has been held sometimes equivalent to, or synonymous with, 'construction' see 16 C. J. S. p 1511 note 93, and 'removal.' It has been compared with, or distinguished from, 'alteration' see 3 C. J. S. p 900 note 43, 'building' see 12 C. J. S. p 382 note 44, 'maintenance,' 'place,' and 'removal.'

"Phrases employing the word are set out in the note. 68. Other phrases for which recent adjudications have not been found see 21 C. J. p 821 note 64-p 822 note 72."

"68. * * * * * (6) 'Erection of public buildings,' as distinguished from 'furnishing' and 'repairing'.
Mo.—Harrington v. Hopkins, 231 S. W. 263, 265, 288 Mo. 1.—Judd v. Consolidated School Dist. No. 3 of Platte County, 58 S. W. 2d 783, 785, 227 Mo. App. 921. * * * * *

The foregoing paragraph cites Harrington v. Hopkins, 231 S. W. 263, 288 Mo. 1, 10. Under this decision, Woodson, J. had the following to say:

" * * * * * In no sense can the words 'furnishing' and 'repairing' be construed to mean the 'erection of public buildings' as those words are used in the Constitution."

In Allen v. Jackson County Savings & Loan Ass'n, 115 S. W. 2d 7, 9, 232 Mo. App. 1098, the court in paragraph 3, among other things, had this to say:

" * * * * * We think a fair construction of the term 'erected' means 'constructed.' The Wisconsin Supreme Court, in Kosidowski v. City of Milwaukee, 152 Wis. 233, 139 N.W. 187, loc. cit. 188, had occasion to construe the labor law of that state, including the following provision thereof: 'any kind in the erection, repairing, altering or painting'; 'a house, building or structure'. That action grew out of injuries received by a workman while employed by defendant city laying water mains. The

court said, 152 Wis. 223, 139 N. W. 187, loc. cit. 198: 'The setting up of the new water main was erecting within the broad sense of the term. Such term includes any work of creating a particular thing out of parts. * * * The thing worked upon, towit: the waterworks system was a "structure." A structure may be below the surface of the ground as well as above. * * * Any artificial creation is a structure,—such as a canal.' Construction of a reservoir was held to be an 'erection' of a building within the meaning of section 6802, R. S. Mo. 1919. Mo. St. Ann. Sec. 13238, p. 4797, under the theory that construction means the arrangement and union of parts. Brackett v. James Black Masonry & Contracting Co., 326 Mo. 387, 32 S. W. 2d 288, loc. cit. 290."

From the statute quoted in your letter we find that a school district, in order to qualify for central high school building aid, must do the following: (1) Secure a school site of not less than five acres for the central building, (2) Erect thereon in accordance with approved plans a suitable and adequate building for a central school containing one large assembly room and the entire structure heated with a modern heating and ventilating system, and (3) The amount of aid available would allow the State to pay one-fourth ($\frac{1}{4}$) of the building and equipment costs provided this one-fourth does not exceed Two Thousand Dollars (\$2000.00). That is to say, Two Thousand Dollars is the maximum that may be expended under this state aid.

The Board of Education of Kidder School District No. 8 contends that by reason of a favorable and fortunate (for

Hon Roy Scantlin

July 12, 1943

them) set of circumstances the board purchased at a bargain price a school building already equipped and in existence, and that whether with the approval of the State Superintendent of Schools or not they should be allowed to qualify for state aid to the extent of Two Thousand Dollars. It would seem from their standpoint that the State Superintendent should assist and encourage them in taking advantage of this opportunity.

We are compelled to disagree with the members of the board for by no forced construction can we read into the statute anything supporting this theory. In disagreeing with the board we must admit that the rule is a harsh one, but we insist that the express terms of the statute must prevail.

Let us examine the situation from the standpoint of legislative intent. Did the Legislature intend to aid and encourage the construction of new school buildings or the purchase of old properties of doubtful and speculative value which might be converted into school buildings? If this school board could buy Kidder College in the present instance, we believe the exception would be a decidedly dangerous precedent in view of the fact that school boards as a whole, if the exception could be followed, could purchase for school building purposes old business structures and other buildings which had outlived their usefulness and were offered for sale at considerably reduced prices. By no stretch of the imagination do we believe the Legislature contemplated encouraging such speculative spending. Such a course must ultimately lead to highly speculative real estate ventures of an impractical and unproductive nature. Such transactions would be without profit or pleasure to the boards involved. The theory might be advanced that in the event the State Superintendent of Schools might approve such a structure an exception be made. We find no provision, either in the statutes or other authorities, for such; and as a school board is a corporation created by the Le-

gislature, a corporation whose actions are limited by legislative action, we believe that such a course would be the beginning of an exceedingly hazardous and unprofitable course of action.

By its very terms, the statute would seem to assist and encourage the erection of new structures bearing the approval of the State Superintendent of Schools.

Having determined that the Kidder School District No. 8 cannot now qualify for aid under the provisions of Section 10499, supra, and cannot, under our interpretation, become eligible to receive state aid, it seems unnecessary to go into the amount this district might receive. However, touching upon this subject, we find that portion of the statute which reads: "the state shall pay one-fourth of the cost of said building and equipment".

The intention of the Legislature was the participation of the state in payment of building and equipment costs up to and including one-fourth of the sums the school boards had actually expended. In this situation the board actually spent Five Thousand Five Hundred Dollars (\$5,500.00); and if the board could otherwise qualify it would seem that one-fourth of Five Thousand Five Hundred Dollars would be the amount the district could ask for under the terms and provisions of the statute. In this case the sum is less than Two Thousand Dollars, the maximum allowed. The fact that the building and adjoining acreage was worth far in excess of that amount would have no determination on the figure allowed under the statute. Payment, as intended by the Legislature, is on the basis of the amount actually expended and not on any other theory. Any other conclusion would seem to encourage speculation and controversy.

We commend the Kidder School District for having members of the board that are farseeing and enterprizing

July 12, 1943

enough to recognize the fact that the college property is worth far more than the purchase price. The denial of their application under this set of facts will work a hardship no doubt, and in the minds of some render a grave injustice. These members may seem to have been penalized for their business judgment in this transaction. We must agree that the rule is a harsh one, but viewed in the light of the statutes as they now exist, we can arrive at no other conclusion.

CONCLUSION

Our conclusion in answer to your specific questions will be taken up in the order set out in your letter.

1. Does Section 10499 R. S. Mo., 1939, require the actual erection of the new and approved school building on the required site before any district could qualify for the state central high school building aid?

Our conclusion, arrived at from the statute and the interpretation given it by the courts, is that a school district, in order to qualify for state aid, must actually construct a structure on a site, and all this must be done with the approval of the State Superintendent of Schools.

2. Would the Board of Education comply with the law in qualifying for the state building aid when the school site and completed buildings meet the required specifications for approval?

Our conclusion is that approval of the State Superintendent of Schools must apply to new structures, for it was contemplated by the statute as it now exists that the state could only encourage the erection of new structures.

Hon. Roy Scantlin

-16-

July 12, 1943

3. Would the Kidder School District No. 8 qualify for the maximum \$2000.00 building aid when the actual cost of such property to the district was only \$5,500.00, even though the original cost of the site and erection of the buildings in 1927 was \$75,500.00?

Our conclusion is that the Legislature, under the terms of this statute, intended paying on the basis of funds actually expended. That this district could qualify for one-fourth of the \$5,500.00 expended, the basis on which the state would participate in this construction, would be the actual and not the speculative cost.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

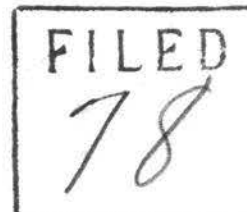
ROY McKITTRICK
Attorney-General

LIM:FS

SCHOOLS: A School Board, having option for apportionment of school aid under either of two statutes, required to continue under statute selected under the option plan.

August 10, 1943

Honorable Roy Scantlin,
State Superintendent of Schools
Jefferson City, Missouri



Dear Mr. Scantlin:

This will acknowledge receipt of your letter of recent date in which you request an opinion based on the following facts:

"Since the consolidated districts can only elect to receive aid under the provisions of Section 10454 or Section 10500 until such time as all additional apportionments provided in Section 10454 are paid in full, and that last year such additional apportionments were paid in full, would consolidated districts be automatically cut off from the consolidated aid apportionment as provided in Section 10500, R. S., 1939, and be required to receive their apportionment under the general apportionment laws as provided in Section 10454?"

Looking to Section 10454 and particularly to that portion useful to our purpose, we find the following language:

"* * * Provided, that until such time as the above mentioned additional apportionments are paid in full, any consolidated district now in existence and operating under the provisions of section 10500 Revised Statutes 1939, may elect to receive

state aid under the provisions of this law or under the provisions of said section 10500; but if said consolidated district elects to receive aid under the provisions of said section 10500, said district shall thereby waive all claim to priority of payment as provided in said section. (Amended, Laws 1941, p. 55Q)"

School boards of consolidated school districts, in making application for the apportionment of state school money, may exercise an option, either to make application under the statute quoted above or Section 10500 which reads as follows:

"Whenever any consolidated school district votes one hundred cents on the one hundred dollars assessed valuation for teachers and incidental purposes and the proceeds of said tax, together with the estimated amount from county, township, and state funds and cash on hand amount to less than fifty dollars per pupil in average daily attendance during the preceding year for teachers and incidental expenses, the state superintendent of schools shall each year apportion to each such district a sum sufficient to enable said district to expend fifty dollars (\$50.00) per year per child in average daily attendance: Provided, that when any consolidated school district votes sixty-five cents on the one hundred dollars assessed valuation for teachers and incidental purposes and the proceeds of said tax together with the estimated income from county, township and state fund and cash on hand amounts to less than forty dollars per pupil in average daily attendance during the preceding year for teachers and incidental expenses, the state superintendent of schools shall each year apportion to each such district a sum sufficient to enable said district to expend forty dollars (\$40.00) per year

per child in average daily attendance: Provided, the district maintains an approved high school of at least the third class and gives an approved course of at least one year in agriculture. The form of requisition for such state aid to be determined by the state superintendent of public schools. The incidental expenses referred to in this section shall include only the general incidental expenses of the district. Aid will not be granted for extensive repair work or for the remodeling of buildings. (R.S. 1929, Sec. 9358. Re-enacted, Laws 1939, p. 711.)"

Before proceeding with an interpretation of the two basis of legislation under consideration, the history of the two statutes may be examined to determine the legislative intent.

Section 10500 we find in the Laws of 1913 at page 724. This section was repealed and a new section created in 1917 at page 496 of the Session Acts. Later, this section became Section 11264 in the revision of 1919. A later revision of 1929 shows this section as 9358 and under the latest revision of 1939 it appears as the present section, 10500. The section has been consistently the same during this entire period and we find that in the revision of our school laws in 1931, at page 334 and paragraph 13, a new section which under the 1939 revision became Section 10454. This would allow school boards an option in making their application for an apportionment of state school money at the time the State Superintendent of Schools made the annual apportionment.

These statutes are unambiguous, needing no construction nor interpretation. It is obvious that the Legislature intended to allow school boards of the consolidated districts some latitude in operational plans, and in order so to do, provided for an alternative decision as between these statutes which we have under consideration.

The problem in this instant case now resolves itself into this question. Should a school board, having exercised an option, be allowed to change operational plans and exercise

their option at their own pleasure and convenience?

The school board is a body created by the Legislature and has under its direction a political subdivision of the State. Because of its legislative creation, it can exercise only those powers and functions expressly given by the Legislature. Under the two statutes which we have open for discussion, we find that in qualifying for state aid, the statute has expressly declared, in the alternative, two plans for the operation of the school district. In qualifying for this state aid and in exercising the option allowed them, these things must necessarily transpire.

(1). A determination by the Board as to the operational statute under which they wish to conduct the affairs of that particular district.

(2). Proper application submitted to the State Superintendent of Schools stating their operation statute number.

(3). The approval and the exercise of said discretion on the part of the State Superintendent of Schools.

We believe all of these elements are necessary to qualify under either of the statutes. A school board, having qualified and signified that section under which they propose to operate, in the opinion of the writer, must necessarily confine its decision once having arrived at a determined operational plan.

We believe it would be consistent good policy to insist that the boards rigidly adhere to a policy, once having been selected. In effect this board is in the same situation as a county court, for example, in the preparation of a budget. This plan corresponds to the budget plan of the court, and we should require a school board to refrain from a shifting from one plan to the other. As we view the situation, the school board, consisting of a group of individuals and having little or no discretion of the conduct of the affairs of their district, shall not be allowed to vacillate between the plan which appears to be productive of the greatest amount of revenue at that particular moment. Should the matter be left

August 10, 1943.

to the discretion and judgment of a single individual, such as the Superintendent of Schools, he should be inclined to favor a more liberal interpretation of the situation.

CONCLUSION

We therefore conclude, from the above and foregoing, that a school board, once having received their apportionment under the general apportionment laws as provided in Section 10454, would be required to operate under the same general plan, once having exercised the option provided for in this section. The same would be true should the board adopt the provisions of Section 10500. In that event, they would be required to receive their apportionment under this latter section to the exclusion of all others.

Since the additional apportionment was paid as received by the State Superintendent of Schools under the situation outlined in your question, the Consolidated District no longer has an option in such matter and would be required to receive their apportionment under the general statutes, that is, Section 10454, R. S. Mo. 1939, because of this statement, which is the last paragraph of the last mentioned section:

"* * * Provided, that until such time as the above mentioned additional apportionments are paid in full, any consolidated district now in existence and operating under the provisions of section 10500 Revised Statutes 1939, may elect to receive state aid under the provisions of this law or under the provisions of said section 10500; but if said consolidated district elects to receive aid under the provisions of said section 10500, said district shall thereby waive all claim to priority of payment as provided in said section. (Amended, Laws 1941, p. 550.)"

Respectfully submitted,

APPROVED:

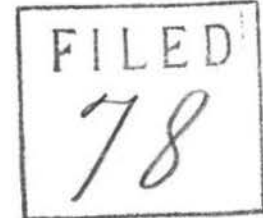
L. I. MORRIS
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

LIM:jn

SCHOOLS: What constitutes erection of building so as to entitle district to state aid.

October 25, 1943.



Hon. Roy Scantlin,
State Superintendent of Schools,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of September 3, 1943, as follows:

"This Department has received an application for state aid for a central high school building as provided in Section 10499, R. S. , 1939.

"The Board of Education of the Buffalo School District No. 1 of Dallas County, in its application for the high school building aid, has certified that it has erected a new building by reconstructing the central high school building which was greatly damaged by fire. Records in this office show that the central high school building of the Buffalo School District was destroyed in part by fire last January. The building which was burned in part was a modern structure and contained twelve classrooms with an auditorium and was erected a little more than two years ago. The fire burned the entire roof from the building, destroyed all the classroom section of the top floor, also other parts of the building were badly damaged from water and later by weather conditions on account of exposure while the roof was off the building. In general, the walls remained in a fairly satisfactory condition to be used again in rebuilding. However, many places in the walls had to be repaired and some sections relaid. The wiring of the building was destroyed and required replacing. This Department has examined the structure and found it to be now rebuilt and in first class condition. The total cost of rebuilding this structure as certified by the Board of Education was \$39,700.00. The Board of Education has in the application requested the state building aid of \$2000.00.

"Section 10499, R.S., 1939, in part, provides that town or consolidated school districts may qualify for the central high school building aid when the following conditions are met:

"1. Secure a school site of not less than five acres for the central high school building.

"2. Erect thereon in accordance with plans and specifications approved by the State Superintendent of Schools a building suitable for a central school, and containing one large central school, one large assembly and a modern heating and ventilating system.

"3. That that state shall pay one-fourth of said building and equipment cost, provided that the amount paid shall not exceed \$2000.00.

"The question arising in connection with this application for building aid is whether or not the school district may qualify for the state aid when the school building has been rebuilt as indicated, placing it again in first class condition.

"I shall appreciate your advice and official opinion in answer to the following question:

"Does the law as provided in Section 10499, R.S., 1939, permit the approval of state building aid for the rebuilding of a new and approved school building where the walls and part of the first floor remain intact and usable for the new structure, or would it require the erection of an entirely new and approved school building in order to qualify for the building aid?"

Section 10499, R. S. Mo. 1939, as amended in Laws 1941, p. 537, insofar as it applies to the instant question, provides that in order to be eligible for state aid the district must secure a five acre site and have

"* * erected thereon, * * * a school building, suitable for a central high school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and ventilating."

We think the answer to your question turns on the meaning to be ascribed to the word "erected" as used in this statute.

In Butz v. Murch Bros. Const. Co., 199 Mo. 279, it is said (l.c. 285):

"One of the primary definitions of the word 'erect' is to 'raise, as, a building; to build, to construct.'"

In the case of In re Howett, 10 Pa. 379, 380, it is said:

"In the common understanding and language of the people, when we speak of the erection or construction of a house or building, we mean the erection of a new house or building, and not the repairing of an old one."

In Harrington v. Hopkins, 288 Mo.1, the question was whether a tax voted for repairing and furnishing a school building was a tax for "erecting public buildings". On this the court said (l.c. 10):

"In no sense can the words 'furnishing' and 'repairing' be construed to mean the 'erection of public buildings as those words are used in the Constitution".

Again in State v. Himmelberger-Harrison Lbr. Co., No. Sup., 58 S.W. (2d) 750, 753, the court discussed this same question, saying:

"It may be, though we are not called on to decide, that a distinct addition to a

building already erected might be covered by the term 'erecting buildings', but mere alterations, improvements, or repairs of existing buildings are not so included."

In Board of Com'rs of Guadalupe County v. State 94 F(2d) 515, (N.M.) the constitution permitted counties to borrow money to "erect necessary public buildings". The county issued bonds for the purpose of "remodeling the County Court House" and "building an addition thereto". The court held such invalid listing the following authority (l.c. 517):

"In 3 Words & Phrases, First Series, p. 2453, under the word 'erect' we find the following:

"'Where the structure of a building is so completely changed that in common parlance it may be properly called a new building or a rebuilding, the process of change is such an erection or construction of a building as to be within the meaning of that phrase as used in laws giving mechanics' liens. Smith v. Nelson (Pa.) 2 Phila. 113, 114.'

"'Erected', as used in a mechanic's lien law, giving a mechanic's lien on every building erected by mechanics, is not used strictly, and applied to the erection of new buildings, but includes, as well, a structure which was so completely changed in repairing that in common parlance it may be properly called a 'new building' or a 'rebuilding.' Thus, where every part of an old building is removed, except the back wall and part of the side walls, and the openings in them are changed, and the whole internal structure and external form of the buildings are changed, both as to its length and height, such a building is erected, within the meaning of the law. Armstrong v. Ware, 20 Pa. (8 Harris) 519, 520."

"Every change, alteration, or addition in or to an existing structure does not constitute an "erection or construction of a building," within the meaning of that phrase as used in laws giving mechanics' liens. The change or alteration must be such that the whole structure, as changed or altered, would commonly be regarded as another new and different building; and the addition of a back building to a main structure - as, for instance, a bathhouse and kitchen to a residence - is not an erection or construction of a building. Rand v. Mann (Pa.) 3 Phila. 429."

However, the court went on to say (l.c. 518):

"* * * And yet it may be conceded that a building may be so greatly changed in structure, in the materials which enter into it, and in its internal arrangements, without at all losing its identity or ceasing to be the same building, and nevertheless be so entirely changed in plan, in structure, in dimensions, and in general appearance as to become, in a fair sense, and according to the common understanding of men, another building, a new building. On the other hand, it is every-day experience that buildings are remodeled more or less extensively and upon a contemplation of the changes, re-formation, re-shaping or recasting there would not be, according to the common understanding of men, the creation of another building, a new building.* * *"

In School Dist. No. 6 v. Robb, 93 P (2d) 905 (Kan.) the statute permitted issuance of bonds to "erect" school-houses, while what was contemplated being done was to put on a new roof and install a heating plant. Plaintiff contended such was proper because a repair was included in the term "erection" since it was the lesser of the greater project.

The court ruled against this proposition, quoting a Missouri authority as follows (l.c. 906):

"In Parker-Washington Co. v. Meriwether, 172 Mo. App. 344, 158 S.W. 74, the question was whether certain street improvements were reconstruction or repavement or repair, and in discussing that it was said: 'In one sense, the term "reconstruction" and the term "repair" are so dissimilar as to render it difficult to make both terms applicable to the same work at the same time. In other words, ordinarily it is not easy to conceive of a thing being reconstructed and repaired at one and the same time. To "reconstruct" is to construct again, to rebuild, to form again or anew; while to "repair" is to restore to a sound state after decay, injury, dilapidation, or partial destruction; to mend. The only sense in which the two terms can be used together concerning a work is that, in those places where decay or dilapidation is so complete as to require a total reconstruction or forming anew, the work can be said to be "reconstructed", while at other points where the decay is only partial, the work is merely mended or repaired. * * * When, however, the proceedings authorizing work to be done employ the words "reconstruct and repair" it should be held to be authorized under those sections which use those terms, and not under another and totally different section which contemplates either the creation or construction of the work as an original matter, or the total substitution of a new work in place of the old."

Then the court said (l.c. 907):

"We cannot agree with plaintiff's argument that the greater includes the lesser. As has been indicated, our statute authorizing issuance of bonds for erecting and equipping of schoolhouses has the schoolhouse for the unit. Were we to agree with the plaintiff,

to be consistent we would have to approve any bond issue the purpose of which was to replace any worn out or obsolete part of a school building - whether it was a new roof, a portion of a roof, a new floor, or a part of one, or some other part or portion of the building. The record here makes it clear that what it is proposed to do here is to put the school building in good condition by replacing or renewing parts of it - in other words, by repairing or replacing worn out or inadequate parts. We think that had it been intended by the legislature that a school district be authorized to issue bonds for such purpose, it would have used language clearly indicating that purpose.* * *

In *Tom v. Board of Com'rs of Lincoln County*, 92 P (2d), 167 (N.M.) the same proposition was presented as was before the New Mexico court in the *Guadalupe County* case, supra, and the court followed its previous decision, but went on to say (l.c.169):

"We do not mean to hold that old public buildings cannot be remodeled with funds obtained from such bond issues, if the effect is to erect a new building. Indeed it has been held, and we hold, that the remodeling of an old public building into what is in effect a new one, is the erection of a public building within constitutional provision and statute."

From the above authorities it seems clear that when Section 10499 used the term "erected" it precludes repairs, but it is also equally clear that what constitutes "erection" of a building and what constitutes a "repair" of a building must be determined on the facts in each instance, since the repair or remodeling may be so extensive as to be actually an erection of a new building.

Turning to the facts which you present to us, it appears the roof and classroom section on the second floor were destroyed. Other parts of the building were damaged due to water and exposure, and the wiring was destroyed. However, the first floor was not destroyed and the walls remained in such condition as to be used in the repairs with some places having to be repaired and relaid. While these facts are rather scanty, it seems to us that the repair of this building cannot be considered to be the "erection" of a building within the meaning of Section 10499 so as to qualify the district for state aid.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney-General.

LLB/LD

SCHOOLS : Construing House Bill No. 494, which will
: become new Section 10454. The maximum
: constitutional levy for consolidated
: school districts not containing an in-
: corporated town or village within boundaries
: is sixty-five cents on the hundred dollar
: valuation. Additional apportionment and as
: provided for in this section is to be made
: on attendance of pupils belonging to the
: district.

November 17, 1943

FILED

78

Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your letter of October, 30, 1943, which, omitting caption and signature, reads as follows:

"This Department is confronted with the problem of the apportionment of state school moneys to school districts in this state as provided in House Bill 494 enacted by the 62nd General Assembly, 1943. Provision is made in this law for what is known as an additional apportionment after all basic or first level apportionments have been paid in full. The two following requirements providing for the calculation of the additional apportionments require interpretation.

"1. Each and every school district in the state which has levied a tax of the maximum constitutional limit shall receive the additional apportionment. Provided, further, that any school district levying less than the constitutional limit for teachers' wages and incidentals shall receive a pro rata part of the maximum apportionment.

"2. An additional attendance apportionment of one and six-tenths (1.6) cents per day per pupil day based on total days attendance of preceding year shall be made.

"In relation to the first part providing for an additional apportionment to districts levying

the constitutional maximum, it is not clear what constitutes the maximum constitutional levy for school purposes (teachers and incidentals) for certain consolidated school districts, particularly those consolidated districts where no incorporated town or village is located. Section 11, Article X, of the constitution fixes the maximum tax rates for school purposes as follows: (1) Districts formed of cities and towns may not exceed \$1.00; (2) in other districts, an amount not to exceed 65¢. Several consolidated school districts in this state do not have located with the district an incorporated town or village. Section 10323, R. S. 1939, in classifying school districts provides in part that all districts outside of incorporated cities, towns and villages which are governed by six directors shall be known as consolidated districts. Section 10493, R. S. 1939, which provides for the organization of consolidated districts places the organization in control of such districts under the laws governing town and city school districts. Section 10494, R. S. 1939, permits consolidated districts to include towns or villages which do not have an enumeration of more than 500 children.

"In relation to part 2 providing for additional apportionments to districts based on days' attendance, it is not clear what constitutes a school district's attendance as a basis for calculating the additional apportionment of one and six-tenths (1.6) cents per day. It is commonly thought that a school district's attendance has reference only to those pupils who are residents of the district. However, in many districts in this state, the board of education admits non-resident elementary and high school pupils as provided in Section 10340, R. S. 1939. The board of education by admitting non-resident pupils has the power to require the tuition to be

Nov. 17, 1943

paid for the attendance of such non-resident pupils. Boards of education in admitting non-resident pupils look to the payment of tuition as the only source of income in meeting the cost of providing such educational facilities.

"Laws of this state in some cases are specific in requiring the attendance on non-resident pupils to be counted back to the pupil's home district as the basis for future state school apportionments to such districts. Other laws, by their very nature, would indicate that the attendance of non-resident pupils in reality belongs to the home or sending district. I refer you to the following laws.

"Section 10456, R. S. 1939, provides that a school district's teaching unit apportionment shall be determined on the basis of the attendance of the preceding year. In general, the laws indicate that the basis for any apportionment to a school district is the attendance of the pupils resident of a district whether or not they attended school within the district or were sent to some other school outside the district. The laws of this state make the school district responsible for providing educational facilities for its pupils.

"Section 10461, R. S. 1939, which authorizes the assignment of pupils from their home district to attend school in an adjoining district, provides specifically that the attendance of such assigned pupils shall be credited to the home or sending district for purposes of making the state school fund apportionment.

"Section 10457, R. S. 1939, which authorizes the temporary combination of school districts provides specifically that the attendance shall be counted back to the home district.

"Section 10465, R. S. 1939, which authorizes

the state superintendent of schools to require districts with less than fifteen average daily attendance to close and send their pupils to some other school outside the district, provides for the apportionment of state school moneys and implies that such districts have established attendance even though the board of directors sent the pupils to some other school outside the district.

"Section 10453, R. S. 1939, authorizes the board of directors of common school districts or others in which high schools are not maintained to pay the high school tuition for their resident pupils who attend high school outside the district. This section further provides that the attendance of such high school pupils shall not be counted by the receiving district in determining teaching units. The teaching unit apportionment as defined in Section 10454 refers only to the attendance of pupils living in the school district providing the high school. This would indicate that the attendance of high school pupils being sent by the rural district to some high school is in reality attendance belonging to the pupil's home district. The Supreme Court, in the case of Burnett vs. Jefferson City School District, 335 Mo. 803, 74 S. W. (2d) 30, pointed out that the \$50.00 high school tuition paid by the state to the receiving district is in reality state aid to the sending or rural district.

" I shall appreciate your advice and official opinion in answer to the following question:

"1. Is 65¢ on the \$100.00 valuation the maximum constitutional tax levy for consolidated districts that do not contain a town or village within the district boundaries?

"2. Is the school district's attendance, to

which is referred in House Bill 494 as a basis for calculating the additional attendance apportionment of one and six-tenths (1.6) cents, only the attendance of the pupils belonging to said district?"

House Bill, No. 494, as enacted by the Sixty-second General Assembly, approved by the Governor, Aug. 5, 1943, reads as follows:

"Section 1. That Section 10454, Article 4, Chapter 72, Revised Statutes of Missouri, 1939, as amended by an act appearing in Laws 1941 at page 550, be and the same is hereby repealed and a new section enacted in lieu thereof to be known as Section 10454 and to read as follows:

"Section 10454. The board of directors of each and every school district in this state is hereby empowered and required to maintain the public school or schools of such district for a period of at least eight months in each school year. In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this act, it is hereby provided that when any district has legally levied for school purposes (teacher's wages and incidental expenses) a tax of not less than twenty cents on each one hundred dollars of the assessed valuation of property therein, such district shall be allotted out of the public school fund of the state an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of section 10456 of this law, one thousand dollars for each high school teaching unit to which the district is entitled according to the provision of section 10456 of this law, and the amount approved for resident transportation and then subtracting from the total, which total shall be known as the minimum guarantee of such district, the sum of the following items:

The computed yield of a tax of twenty cents on each one hundred dollars (\$100) of the assessed valuation of the property of the district, the sum received the preceding year from the county and township school funds, and the sum estimated to be received for the current year from the railroad, telegraph, utility and all other taxes based on assessments distributed by the state board of equalization. The state superintendent of schools is hereby empowered, and it shall be his duty, on or before the 15th day of August, 1943, and on or before the 15th day of August of each year thereafter, to apportion the public school fund of the state as follows: He shall calculate an equalization quota, as hereinbefore defined, for each and every district entitled to such quota. For each and every district not entitled to an equalization quota he shall calculate a teacher quota in accordance with the basis provided in section 10390, Revised Statutes 1939, and an attendance quota in accordance with the basis provided in section 10390, Revised Statutes 1939, at the rate of one and three-tenths (1.3) cents a day. He shall apportion to each and every district for which an equalization quota was calculated the amount as hereinbefore provided, and he shall apportion to each and every district not receiving an equalization quota the teacher and attendance quotas as above provided. On or before the 15th day of December, 1943, and on or before the 15th day of December of each year thereafter, he shall determine the amount of the public school fund in the state treasury as of the last day of the preceding November, and from this amount he shall apportion to each and every district for which an equalization quota was calculated at the time of the apportionment made on or before the 15th day of August last preceding, the remainder of such quota, if any remainder there be. He shall also apportion to each and every district for which teacher and attendance quotas were calculated at the time of the apportionment made on or before the 15th day of August last preceding the remainder of such quotas, if any remainder there be, or such part of such remainder as the funds available for apportionment will permit; and on or before

the 15th day of March, 1944, and on or before the 15th day of March of each year thereafter, he shall determine the amount of the public school fund in the state treasury as of the last day of the preceding February, and from this amount he shall apportion to each and every district for which an equalization quota was calculated at the time of the apportionment made on or before the 15th day of August, last preceding, the remainder of such quota, if any remainder there be. He shall also apportion to each and every district for which teacher and attendance quotas were calculated at the time of the apportionment made on or before the 15th day of August last preceding the remainder of such quotas, if any remainder there be, or such part of such remainder as the funds available for apportionment will permit: Provided, that special state aid shall continue to be apportioned as now or hereafter provided by sections 10353, 10356 and or 10583, Revised Statutes, 1939: Provided further, that the state superintendent of schools shall at the time of making the annual apportionment, apportion to the various districts their allotments of building, transportation and /or tuition aid as provided by law; Provided, however, in the event there should be insufficient funds to carry out the minimum guarantee of seven hundred fifty dollars (\$750.00) for each elementary teaching unit and one thousand dollars (\$1,000.00) for each high school teaching unit, and the teacher quota and the attendance quota of one and three-tenths (1.3) cents for such districts as do not participate in the minimum guarantee, all school funds to be apportioned by virtue of the provisions of this act shall be apportioned to all districts in pro rata proportion, paying such percentage of each and every one of these apportionments as the money available in the public school fund will permit; Provided further, that after all apportionments hereinbefore provided have been paid in full, the state superintendent of schools shall make an additional apportionment

to each and every district in the state which has levied a tax of the maximum constitutional limit for school purposes (teacher's wages and incidental) and to which an equalization quota or teacher and attendance quota apportionments have been made on or before the 15th day of August, last preceding, of two hundred dollars (\$200) for each elementary teaching unit in which a teacher having a state certificate is employed; one hundred twenty-five dollars (\$125) for each such unit in which a teacher having a first grade certificate is employed; one hundred dollars (\$100) for each such unit in which a teacher having a second grade certificate is employed; fifty dollars (\$50) for each such unit in which a teacher having a third grade certificate is employed and three hundred dollars (\$300) per high school teaching unit; and an additional attendance apportionment of one and six-tenths (1.6) cents per pupil day based on total days attendance of preceding year to each and every such district to which teacher and attendance quotas or equalization quota apportionments have been made. Provided further, that any school district levying less than their constitutional limit for school purposes (teachers wages and incidentals) shall receive that percent of such additional apportionment as the tax rate levied in said district is of said constitutional limit for said purposes. In the event the amount of money in the public school fund is not sufficient to pay these quotas in full the state superintendent of schools shall pay such percentage of both the teaching unit and the attendance quotas as the amount in the public school fund will permit; Provided, further, that after all apportionments hereinbefore provided have been paid in full the state superintendent of schools shall apportion any excess remaining in the school fund equally among all of the districts of the state in proportion to the number of teaching units in each district as reported to the state superintendent for the preceding year: Pro-

vided that until such time as the above mentioned additional apportionments are paid in full, any consolidated district now in existence and operating under the provisions of section 10500, Revised Statutes 1939, may elect to receive state aid under the provisions of this law or under the provisions of said section 10500; but if said consolidated districts elects to receive aid under the provisions of said section 10500, said district shall thereby waive all claim to priority of payment as provided in said section. "

That portion requiring construction has been underscored and we now proceed with the questions raised in your request.

1. Is 65¢ on the \$100.00 valuation the maximum constitutional tax levy for consolidated districts that do not contain a town or village within the district boundaries?

Directing attention to that portion of the Missouri Constitution which concerns Revenue and Taxation, namely, Article X, we find that at section 11, and that portion devoted to the limits for local school purposes, a division of schools when the question of the annual rates for school purposes is raised.

1. In districts formed of cities and towns, for school purposes the levy may be increased to an amount not to exceed \$1.00 on the \$100.00.

2. In other districts, for school purposes an amount not to exceed 65¢ per \$100.00 may be levied.

After providing rates for local purposes, prescribing limits, etc., the Constitution, Article X, Sec. 11, reads as follows:

" For school purposes in districts composed of cities which have 100,000 inhabitants or more, the annual rate on property shall not exceed 60¢ on the \$100.00 valuation and in other districts, 40¢ on the \$100.00 valuation. Provided, the aforesaid annual rates for school purposes may be increased in districts formed of cities and towns, to an amount not to exceed \$1.00 on the \$100.00 valuation, and in other districts to an amount not to exceed 65¢ on the \$100.00 valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increases." (Underlining ours.)

Our courts have, in numerous cases, defined what was a "city or town district" and "other district" where the question of the constitutional limitation on taxation for school purposes. We find

In State ex rel, Brown v. Woods, 61 S. W. 2d, 732, 332 Mo. 1123 :

"* * * First, all districts having only three directors shall be known as common school districts; second, all districts outside of incorporated cities, towns and villages, which are governed by six directors, shall be known as consolidated school districts; third, all districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts, and fourth, all districts in which is located any city of the first, second or third class shall be known as city school districts." Section 11123, R. S. Mo. 1919 (Section 9194, R. S. Mo. 1929 (Mo. St. Ann. Sec. 9194). ***"

"*** Thus, it appears that by organization under sections 11257, 11258, 11259, R. S. 1919, and by classification under section 11123, R. S. 1919, which was in force at the time of the consolidation, the Patterson consolidated district is not a city or town district. It is one of the "other districts" as that term is used in Section 11, article 10, of the Constitution. It follows that the rate of taxation for school purposes in said districts cannot exceed 65 cents on the \$100 valuation of the property in the district.***"

The attitude of our courts with respect to a levy made for building purposes and actually required for operating revenues is responsible for this observation in an opinion by Hays, Judge, in

Russell v. Frank, 154 S. W. 2d, 1. c. 67,
348 Mo. 533

"* * * We can only repeat in this connection what we said in the Marlowe case, 58 S. W. 2d, loc. cit. 754: 'This may be a laudable purpose from one standpoint, but from a legal standpoint it constitutes legal fraud. While this court will allow school boards large latitude and discretion in providing and expending school revenues, even to the extent of anticipating the future needs and possible deficiencies in the means provided, yet the rights of the taxpayers must be guarded and the taxes imposed kept within the constitutional limits. * * *'"

See State ex rel. and to Use of Buck, Revenue Collector, v. St. Louis & S. F. Ry. Co., 174, S. W. 64.

"Const. art. 10, Sec. 11. as amended in 1902, (Laws 1901, p. 266) provides that for school purposes the annual rate in districts 'formed' of cities and towns may not exceed \$1, and in other districts not exceed 65 cents on a \$100 valuation. Rev. St. 1909, Sec. 10775, classifies school districts and declares a district governed by six directors and in which is located any city of the fourth class or any incorporated town or village to be a town school district. Section 10825 empowers the county clerk to levy upon all property in a town school district not to exceed one per cent, for school purposes, and section 10864 provides that any organized town or city school district shall include only the territory in the corporate limits of the city, town or village organizing as a school district, and such outside territory as may, by the creation of the new district, be cut off from the district to which it formerly belonged. Held, that the verb 'form'

meant to go to make up, to be an element or essential constituent of; said of that out of which anything is formed or constituted in whole or in part; that the term 'formed of cities and towns' did not require that the limits of such city or town school district be coterminous with the limits of the incorporated town or city; that the provision for attaching outlying contiguous territory was constitutional; and that a town district organized with contiguous outside territory might levy taxes not exceeding \$1 on the \$100 valuation. * * *

From what has been read thus far, we conclude that a consolidated school district outside of an incorporated town is the "other district" as set out in Art. X Sec. 11, Mo. Cons. As such "other district" the constitutional tax levy limit is 65¢ per \$100 valuation.

The question now comes as to the intention of the Legislature with respect to this additional apportionment when the limit in one class of schools is \$1.00 per \$100 and in the other 65¢ per \$100.00?

We believe from our study that the important idea our lawmakers had in mind was to require the maximum levy in each district possible under the constitution. Having clearly made a positive definition of the different classes of districts, the Legislature, insisted only on maximum constitutional levies as a basis for this additional apportionment. The basis of this conclusion is predicated on the following:

That portion of the new section, 10454, R. S. Mo., 1939, useful for our purpose reads:

"Provided further, that after all apportionments hereinbefore provided have been paid in full, the state superintendent shall make an additional apportionment to each and every district in the state which has levied a tax of the maximum constitutional limit for school purposes. * * *

In construing the language used above, the words used are not technical, their meaning is clear

and unambiguous. They are to be understood in their usual and ordinary sense. Numerous decisions support this theory and we cite

State ex rel, Buck v. Railway, 174 S.W. 64, Par. 2, in this instance.

It is unnecessary to define the word "maximum" and we further point out the fact that the superintendent shall make the additional apportionment to each district which has qualified by levying the maximum constitutional limit for school purposes. This is a mandatory duty imposed and nothing is left to the discretion of the superintendent, if and when, the statutory requirements have been met by the district.

Obviously, the maximum constitutional limit in the case of "other district" is 65¢ per \$100.00 valuation and for the first two classes of districts the limit is \$1.00 per \$100.00 valuation, and we hold that the superintendent shall make the additional apportionment on that basis.

The second paragraph of your request reads:

"2. Is the school district's attendance, to which is referred in House Bill No. 494, as a basis for calculating the additional attendance apportionment of 1.6 cents, only the attendance of the pupils belonging to the said district?"

Before arriving at a conclusion it would seem advisable to examine the statutes and decisions relating to the basis used in the determination of school apportionments.

Referring to House Bill No. 494, where the matter of attendance quota apportionments is announced, we find:

"* * * and an additional attendance apportionment of 1.6 cents per pupil day based on total days attendance of preceding year, to each and every such district to which teacher and attendance quotas or equalization quota apportionments have been made."

Nov. 17, 1943

We call to your attention sections 10457, 10458, 10461, 10456, 10464, R. S. Missouri, 1939.

We do not propose to quote these sections, because of their extreme length, instead we shall digest those portions and point out the provisions involving the methods employed in charging non-resident pupils to home or receiving districts.

Section 10457, R. S. Mo., 1939, provides for temporary combination of school districts and further states "that in such temporary combinations the record of daily attendance of pupils of each district shall be kept separate, and credited to their respective districts, as a basis for future apportionments.

Section 10458, R. S. Missouri, 1939, in authorizing a board to pay transportation and tuition costs, provides that the receiving district shall not count the non-resident pupils in determining teaching units, and the attendance of high school pupils is in effect to be credited to the home or sending district.

There are numerous decisions in our courts which sustain the theory that tuition payments in the case of non-resident pupils is state aid offered to the sending district, and as such is credited to the pupils' home district. These decisions point out that payment of the fund in such situations is made to the receiving district, yet that procedure is a matter of book keeping and proper credit is given sending district.
See

Herculaneum v. Pevely District, 139 S. W. 2d, 1106
St. Charles Co. v. West Alton Dist. 162 S.W. 2d, 305
159 S.W. 2d, 676

Board of Education of St. Louis v.
St. Louis County, 149 S. W. 2d, 878
347 Mo. 1014

Burnett v. Jefferson City District, 74 S. W. 2d, 30
335 Mo. 803

Section 10461, R. S. Missouri, 1939, in making provision for assignment of pupils to the most accessible school, makes this statement. " *** the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the Board of Directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned."

Section 10456 R. S. Missouri, 1939 in setting out and defining a teaching unit, specifies that unit apportionment is to be based on attendance of the preceding year. A further provision indicates that the basis of apportionment is the attendance of pupils resident, and this, regardless of the fact that some may have been sent to other districts.

Section 10464, R. S. Missouri, 1939. In the low attendance districts, authority to close the school and transport is given the State Superintendent of Schools. Tuition and Transportation fees are still the responsibility of the board of the closed school. The natural inference is, that the District has an established attendance and is so charged with the responsibilities of the district, despite the fact it has been, for practical purposes, closed.

In each of the above apportionment situations, whether it involves tuition, transportation, a teaching unit, closing of a school, or a temporary combination of schools, the fundamental idea prevails that pupils of the home or sending district do not lose their identity even though they attend schools outside their district.

Numerous practical matters have had to be taken into consideration in reaching these expressions of intent by the Legislature. Any other method would lead to duplication, confusion and disorder. This would eventually require pupils to rigidly adhere to the home district in every instance.

They may take up residence in other districts, and as such become members of the new district. The annual enumeration will take care of that situation.

Honorable Roy Scantlin

-16- November 17, 1943

We conclude, therefore, that the Legislature had this in mind when the new section, 10454, R. S. 1939, was put on the statute books.

C O N C L U S I O N .

From all of the above, we therefore, give as the opinion of this office:

1. That a levy of 65¢ on the \$100.00 valuation is the maximum constitutional tax levy for consolidated school districts which do not contain a town or village within the district boundaries.

It is our further opinion that the Legislature intended the school apportionment to be made on the basis that those districts levying their constitutional maximum would become eligible for the apportionment allowed under the terms and conditions as provided for in House Bill No. 494, and which will subsequently become new section 10454.

2. That as a basis for calculating the additional apportionment of 1.6 cents, as provided for in new section 10454, only the attendance of the pupils belonging to the district will be considered.

All of which is respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

LIM:LeC

SCHOOLS: State Superintendent of Schools may authorize and approve state aid for special classes for physically and mentally handicapped children for less than the maximum amount allowed under the statutes.

August 2, 1943



Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri

Dear Mr. Scantlin:

This will acknowledge receipt of your letter of July 20, 1943, requesting an opinion, which is, omitting caption and signature, as follows:

"Inquiry has come to this Department about the laws governing the distribution of state school moneys based on special classes for handicapped children.

"Section 10351, R. S., 1939, authorizes the board of education to provide instruction for the physically handicapped children in the elementary grades when there are ten or more such handicapped children in the school that need such special instruction, or fifty or more for speech defectives as provided in Section 10355, R. S., 1939.

"Section 10353, R. S., 1939, provides for the apportionment of state aid for school districts in which special approved classes are provided for handicapped children. The amount to be apportioned by the state is limited to \$750.00 per annum for each teacher employed wholly in the instruction of pupils of the aforesaid classes pro-

August 1, 1943

vided that state aid shall in no case exceed two-thirds of the salary paid by the board of education. It appears that in some school districts of this state, classes may be organized on a more economical plan of instruction on a part-time basis. For example, one-half of the teacher's time may be given wholly to the instruction of special classes for handicapped children as provided in the law. The qualifications of the teacher, the number of pupils enrolled and other requirements of the law are fully met.

"I shall appreciate your advice and official opinion in answering the following question.

"1. Would it be in compliance with the provisions of the law for this Department to appropriate state aid to school districts on a part-time basis for only that time spent wholly in the instruction of handicapped pupils? For example, one-half of the teacher's time may be given wholly to the instruction of these classes for handicapped children as provided in the law. If it is proper to reimburse school districts for the time spent wholly in approved classes for the instruction of handicapped children for time less than the full day, the amount for a district giving one-half time would be only \$375.00 instead of \$750.00 for the full day class for the entire school term."

Directing our attention to the statutes of this State as they apply to all classes of schools we find at Section 10351 R. S. Mo., 1939, and subsequent sections provisions for special classes of students in school districts. We find it unnecessary to quote the entire section but merely

point out that the Legislature, in providing for the instruction of the physically and mentally handicapped children of the state, imposed on the board of directors of each school district the duty of ascertaining annually the number of children in a district belonging to the physically and mentally handicapped group. We find that school directors in school districts may provide instruction and special training for handicapped children. This instruction is to be limited to the elementary grades with certain provisions for the transportation of these individuals.

Section 10352 R. S. Mo., 1939, provides for joint schools for this special education provided appropriate state institutions are not available for this type of pupil.. For the mutual benefit of school districts, their patrons and pupils arrangements may be made for joint school contract with adjacent school districts.

Section 10353 R. S. Mo., 1939, reads as follows:

"The state superintendent of public schools is hereby authorized to inspect and approve all special classes established under the provisions of Sections 10351 and 10352. Each school district maintaining special classes as provided for in the aforesaid sections, shall, when these classes have been approved by the state superintendent of public schools, receive state aid to the amount of seven hundred fifty dollars (\$750.00) per annum for each teacher employed wholly in the instruction of the pupils of the aforesaid classes: Provided, however, such aid shall not be granted for any teacher who has not been especially trained for work in such classes; and provided further, that the amount of special training shall be in accordance

with the rules and regulations established by the state superintendent of public schools, the amount of state aid granted on account of any teacher shall in no case exceed two-thirds of the salary paid such teacher by the local board. The state superintendent shall require such reports as he may desire from each of these special classes. The state superintendent shall cause the state treasurer to forward to the county clerk of each county, and to the secretary of the board of education of the city of St. Louis, the total amount shown to be due such county or such city under the provisions of this section."

Applying the provisions of this section to the problem raised in your letter, we find that the State Superintendent is authorized to approve special classes established under Sections 10351 and 10352 R. S. Mo., 1939. We further find that having exercised his discretion in the matter there is a mandatory provision that the district is to receive state aid to the amount of \$750.00 per teacher employed wholly in the instruction of pupils coming under the provisions of Sections 10351 and 10352, supra. Section 10351 further requires that the teacher shall be especially trained for work in the instruction of such pupils and that the state aid will not be available unless the teacher is so qualified. We find the further provision that the amount of such training is left to the discretion of the State Superintendent for the statute reads, "The amount of special training shall be in accordance with the rule and regulation established by the state superintendent."

Reading further, state aid granted on the salary of this teacher of these special classes shall in no case ex-

ceed two-thirds of the salary paid by the local board.

Digressing for the moment and looking to that portion of the section which reads, "Each school district maintaining special classes as provided for in the aforesaid sections, shall, when these classes have been approved by the superintendent of schools, receive state aid to the amount of seven hundred fifty dollars (\$750.00) per annum for each teacher employed wholly in the instruction of the pupils of the aforesaid classes: * * *"

We find the following definition of the word "wholly" in Webster's Dictionary, "In a whole or complete manner; entirely; completely; perfectly; to the exclusion of other things; totally; fully". For the purposes of our discussion we deem it unnecessary to go into great detail concerning the word "wholly". The program designed for this type of instruction being determined from examination by the State Superintendent as to the professional qualifications of the instructor and the practical needs of the district under consideration taken into consideration the intention of the Legislature we deem it unnecessary to more than point out the fact that the common usage of the word "wholly" is "in a whole or complete manner." As we shall point out later, if this program can be carried out in a whole or complete manner by having the instructor devote one-half the school day to this type of instruction we believe the intent of the Legislature to have been adequately complied with.

The question now arises, may the superintendent approve a program of instruction for handicapped children calling for less than the \$750.00 per annum for a teacher employed in the instruction of handicapped pupils. From our reading of the statutes and the interpretation of the word thereof it would seem the obvious intention of the Legislature to pay one-third of the salary of the qualified teacher approved by the State Superintendent if and when she devoted her entire time to this class of instruction. It would seem that the establishment of this special form of

August 1, 1943

instruction within a school district rests entirely within the discretion of the State Superintendent. Having exercised that authority and discretion his duties become mandatory. As you will note, the statute declares that the district shall receive state aid to the amount of \$750.00. In other words, having determined that the district has qualified and having passed the point of approval, then all the other provisions of the statutes are mandatory and the State Superintendent could be required to fulfill all the obligations imposed.

The State Superintendent, having the authority to inspect, approve, and superintend the establishment of these classes, we see no reason why, in the exercise of his judgment, he may not, for example, reduce this program or restrict it to one-half the usual period of instruction, and in that event state aid would be available for one-half of the sum of \$750.00. This maximum amount may not be exceeded; and we see no good reason why, if the judgment of the superintendent so dictates, one-half of this amount may not be used in the operation of this special instruction program.

CONCLUSION

We therefore conclude from our reading of the statutes that the State Superintendent of Schools may authorize and approve special classes for physically and mentally handicapped children, which arrangement would call for less than the maximum amount of the state aid allowed such school districts who may qualify.

Respectfully submitted,

APPROVED:

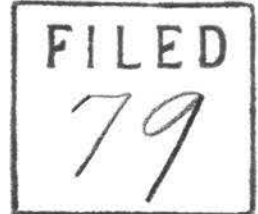
L. I. MORRIS
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

LIM:FS

INSURANCE: Approval of Articles of Incorporation of Jefferson Mutual Fire Insurance Company of St. Louis, amending its charter.

August 4, 1943



Honorable Edward L. Scheufler
Superintendent
Insurance Department
Jefferson City, Missouri

Attention: Mr. Lawrence Presley,
Counsel

Re: Amendment of Charter
of Jefferson Mutual Fire
Insurance Company of St.
Louis

Dear Mr. Scheufler:

We have your letter of August 4, 1943, enclosing for our attention declaration of Jefferson Mutual Fire Insurance Company of St. Louis amending its charter, and the affidavit of the publisher that notice of special meeting of the policyholders was published as therein set out, which have been submitted by you to the Attorney-General for examination.

We have examined same and found the Articles of Incorporation to be in accordance with the provisions of Article 6, Chapter 37, Revised Statutes of Missouri for 1939, and not inconsistent with the Constitution and laws of this State and the United States, and same is hereby certified accordingly.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:EG

SCHOOLS: Vacancies filled by appoint-
COUNTY TEXTBOOK COMMISSION: ment by Governor.

May 15, 1943



Honorable Roy Scantlin, Chairman
State Board of Education
Jefferson City, Missouri

Dear Mr. Scantlin:

We have received your request for our opinion by your recent letter which states:

"This question arose during our conference May 1:

"Who has the legal right to make appointments to the County Textbook Commission, the Governor of Missouri, or the State Board of Education?"

On May 10, 1943, you advised us in a telephone conversation that the real question is "Who has authority to make appointments to fill vacancies on said commission?"

The County Textbook Commission was created by Section 10636 R. S. Mo., 1939, which provides:

"There is hereby created a county textbook commission, which shall be the county board of education in all counties in which such a board exists. In counties where there is no county board of education the school textbook commission shall consist of the county superintendent

of schools and two teachers, who shall be selected in the following manner: One member to be appointed by the County Court in each county and one member to be appointed by the state board of education, the appointments to be made in April, 1939, and every two years thereafter: Provided, that no person shall be appointed to serve on the said commission who has been in the employ, as a traveling salesman or otherwise, in this state, of any publisher of school textbooks within the period of two years prior to this article. Vacancies on the commission, resulting from death, resignation, removal from the county, disqualification, or otherwise, shall be filled as prescribed by law. A majority of the commission shall constitute a quorum for the transaction of all business of the commission." (Underscoring ours)

The vacancies are to be filled "as prescribed by law." There is no special statute providing for the filling of vacancies on this commission. The only statute of general application providing for the filling of vacancies is Section 11509 R. S. Mo., 1939. It is expressly limited in its terms to "any state or county office originally filled by election by the people * * *." Except for the county superintendent of schools, memberships on this commission are filled by appointment. Therefore, said Section 11509 is not applicable.

Section 10637 R. S. Mo., 1939, provides that, "The county superintendent shall be ex officio president of the commission." Of course, where a vacancy occurs in the office of county superintendent, the Governor is authorized

to fill the vacancy by appointment. Section 10609 R. S. Mo., 1939. This does not settle the question as to members of the commission other than the county superintendent.

There is a general provision of the Constitution of Missouri which governs this case. Article V, Section 11 of the Constitution of Missouri provides:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

As stated in State ex inf. Wayland v. Herring, 106 S. W. 984, 208 Mo. 708, 732, said constitutional provision "gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law * * * when no other provision is made by law." Membership on this commission is an office within the meaning of Article V, Section 11, supra.

Definitions of the term, office, are found in State ex inf. McKittrick v. Whittle (Mo. Sup.), 63 S. W. (2d) 100, which was decided under Article XIV, Section 13 of the Constitution of Missouri, and applied to "Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office, * * *" In that case, at page 102, the Court said:

"Thus it appears that a school district is a political subdivision of the state within the meaning of section 13, art. 14, of the Constitution.

"Respondent next contends that a school director is not a public officer within the meaning of said section of the Constitution. We have ruled the question as follows:

"'A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off. 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer.

"'The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer.' State ex rel. v. Bus, 135 Mo. 325, loc. cit. 331, 332, 36 S. W. 636, 637, 33 L. R. A. 616. To the same effect, State ex rel. Zevly v. Hackmann, 300 Mo. 59, loc. cit. 66, 67, 254 S. W. 53; Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S. W. 700.

"Thus it also appears that a school director is a public officer within the meaning of said section of the Constitution."

A large number of other definitions are contained in State ex rel. Zevely v. Hackmann, 254 S. W. 53, 300 Mo. 59.

Members of the County School Textbook Commission serve for a fixed period or term. They are compensated. Their duties are fixed by law. Section 10638 R. S. Mo., 1939, in part provides:

"Said commission shall adopt from the authorized state list, as hereinafter provided, a uniform series of textbooks for use in the schools of all the districts of the county, * * * * *

In exercising the important function of selecting books to be used in the schools, the members of the commission exercise an important portion of the sovereign functions of the government for the benefit of the public.

It was held in the quoted portion of the opinion in State ex inf. McKittrick v. Whittle, that a director of a single school district within a county is a public officer. The members of the County Textbook Commission act for their entire county. Their position is analogous to that of a director of a school district.

Members of the commission serve with the county superintendent, who is, of course, a public officer. In view of the foregoing propositions, it is our opinion that membership on the commission is clearly an office within the meaning of Article V, Section 11.

Unless said constitutional provision applies to this case, there would be no provision of law for filling vacancies on the commission, and the provision in Section 10636,

supra, that vacancies "shall be filled as prescribed by law," would be meaningless. We believe the Legislature intended to have vacancies filled and intended for the statutes pertaining to the commission to have effect. This view is supported by well established principles of statutory construction. In *Graves v. Drainage District*, 345 Mo. 557, 134 S. W. (2d) 70, 78, the Court said:

"Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect." *State ex rel. Dean v. Daves*, 321 Mo. 1126, 1151, 14 S. W. 2d 990, 1002. * * * * *

It is well settled that appointees hold office for the unexpired term. *State ex inf. Wayland v. Herring*, 1. c. 726 of 208 Mo. Upon the expiration of the unexpired term the new appointment would be made in the manner provided by Section 10636, which was quoted at the outset of this opinion.

For the sake of clarity, it is noted that Section 10636, supra, provides that the textbook commission "shall be the county board of education in all counties in which such a board exists." That statute, in its present form, was first enacted in Laws of Missouri, 1907, page 434.

Then, there was in existence a county board of education, created in Laws of Missouri, 1901, pps. 246-249, and having authority to "adopt a course of study for use in all the public schools in the county," and "to examine teachers and grant certificates of qualification to teach in their respective counties." The provision for the board was carried forward

Hon. Roy Scantlin

-7-

May 15, 1943

as Revised Statutes of Missouri, 1909, Sections 10939 to 10949, Article IX, Chapter 106.

It was repealed and the county board of education was abolished by Laws of Missouri, 1911, pps. 407-412. By that Act functions previously vested in the county board of education were given to the county superintendent of public schools, and those provisions now are found in Sections 10625 to 10635, R. S. Mo., 1939.

There is no county board of education in Missouri. Therefore, membership on the county school textbook commission and vacancies in such membership are filled in the manner heretofore stated and the references in the statutes to the county board of education should be disregarded.

CONCLUSION

In view of the above authorities it is the opinion of this office that vacancies on the County School Textbook Commission are to be filled by appointment by the Governor. Membership on said commission is a public office. The person appointed to fill said vacancy serves for the remaining portion of the unexpired term.

There is no county school board under existing Missouri law.

Very truly yours,

APPROVED:

ERNEST HUBBELL
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

EH:FS

LINCOLN UNIVERSITY: Powers and functions of Board of Curators with respect to operation and maintenance of institution.

December 3, 1943

12/7



Dr. Sherman D. Scruggs, President
Lincoln University
Jefferson City, Missouri

Dear Doctor Scruggs:

We are in receipt of your letter of December 1, 1943, as follows:

"The Board of Curators of Lincoln University has held certain opinions as to its powers and function in the operation and maintenance of the Lincoln University, the State supported institution for the higher education of the Negro residents of the State. It would request of you a statement of the validity of these opinions.

"1. It is the opinion of the Board of Curators of this Institution that by statutory provision the control of this Institution is vested in this body (the Board), and by this symbol the Board is responsible to no higher authority, provided that in the administration of the educational offerings of the Institution the Board's actions are in conformity with sound educational practice.

"2. It is the opinion of the Board of Curators of this Institution that this body (the Board) is authorized and required to operate and maintain an institution of learning that shall afford to the Negro people a quality of educational offerings up to the standard provided for other citizens at the State University of Missouri.

"3. It is the opinion of the Board of Curators of this Institution that the Board can provide and maintain educational offerings of acceptable and

required standards only so long as funds are adequate and available for such operations and purposes.

"4. It is the opinion of the Board of Curators of this Institution that the Board may in its discretion and best judgment make such distributions and allocations of its appropriated funds as shall enable it (the Board) to operate and maintain the educational offerings and services of the Institution at the level of acceptable and required standards.

"5. It is further the opinion of the Board of Curators of this Institution that the Board may in its discretion and best judgment reorganize or discontinue any course, departments or schools in the Institution when the available funds are inadequate for their operation or maintenance at acceptable and required standards of excellence.

"For your earliest consideration of these opinions the Board of Curators would be most grateful to you."

The powers and functions of the Board of Curators, with respect to the operation and maintenance of Lincoln University, are contained in the Statutes of Missouri.

Section 10,774, R. S. Mo. 1939, provides that:

"The Board of Curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University of Missouri. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to open and establish any new school, department or course of instruction, to provide necessary additional equipment, and to locate the respec-

tive units of the university wherever in the State of Missouri in their opinion the various schools will most effectively promote the purposes of this article."

Section 10,775, R. S. Mo. 1939, provides in part as follows:

"The Board of Curators of Lincoln University of Missouri, shall hereafter consist of nine members who shall be appointed by the Governor, by and with the advice and consent of the Senate. * * * * *

Section 10,778, R. S. Mo. 1939, provides as follows:

"It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state university of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state university of Missouri, except as stated in this article."

Section 10,783, R. S. Mo. 1939, sets out the powers and liabilities of the Curators of the University of Missouri in part as follows:

"The university is hereby incorporated and created a body politic, and shall be known by the name of 'the Curators of the University of Missouri,' and by that name shall have perpetual succession, power to sue and be sued, complain and defend in all courts; to make and use a common seal, and to alter

the same at pleasure; to take, purchase and to sell, convey and otherwise dispose of lands and chattels; to act as trustee in all cases in which there be a gift of property or property left by will to the university or for its benefit or for the benefit of students of the university; to condemn and appropriate real estate or other property, or any interest therein, for any public purpose within the scope of its organization, *

* * *

I

A reading of the above statutes reveals unequivocally that all authority, liabilities, privileges and immunities with respect to the operation and maintenance of Lincoln University is vested in the Board of Curators of Lincoln University, and in it alone.

You raise the further question as to whether the Board of Curators is responsible to any higher authority, provided, of course, that in the administration of the university the board's conduct is in conformity with sound educational practice.

Obviously, in a limited and narrow sense, all public institutions and their administrators are responsible ultimately to the people of the state, and the people are able to exercise their prerogatives through the legislature. We desire to have it understood, however, that we are not considering the term "responsible" in such a limited sense.

Section 12,826, R. S. Mo. 1939, provides that the governor may remove any appointive state official when, in his opinion, such removal is necessary for the betterment of the public service. Said section is as follows:

"The Governor shall have power and he is hereby authorized to remove from office, without assigning any other reason therefor, any appointive state official required by law to be appointed by the Governor, whenever in his

opinion such removal is necessary for the betterment of the public service, but the Governor may, at his discretion, in any order of removal which he may make under authority of this act, assign additional and more specific reasons for such removal."

The governor, under the terms of the above statute, may remove from office any and all members of the board and appoint new members in place of these removed members, irrespective of whether such board is conducting itself properly. The governor need only determine that such removal is necessary for the betterment of the public service. This is a matter wholly within the governor's discretion, and he need assign no reasons for removal if he does not so desire.

The fact, however, that the governor is vested with the power of removal cannot, under any rule of construction, be interpreted as transferring control of the institution from the board to the governor. His power with respect to the conduct of the institution is limited strictly by statute to the power of removal alone.

We are of the opinion that all authority, liabilities, privileges and immunities, with respect to the operation and maintenance of Lincoln University, are vested by statute solely with the Board of Curators of Lincoln University, and, consequently, that the control of said institution is solely in said board. We are further of the opinion that the board, absent the power of removal by the governor, with or without cause, is responsible to no higher authority for its conduct of the administration of the university.

II

Your second statement is governed by Section 10,774, supra, which provides in part that:

The Board of Curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University of Missouri."

The language in the above statute is clear and unambiguous, and needs no statutory construction (Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920).

We agree with your second statement and are of the opinion that the Board of Curators of Lincoln University is authorized and required to operate and maintain Lincoln University in such a manner that the negro people of the state will be afforded an opportunity for training up to the standard furnished at the State University of Missouri.

III

Section 10,778, supra, provides that the Board of Curators of Lincoln University shall organize and have the same powers as those prescribed by statute for the Board of Curators of Missouri University.

Section 10,791, R. S. Mo. 1939, provides as follows:

"The president and treasurer of the university, residing at Columbia, and treasurer of the school of mines and metallurgy, residing at Rolla, shall, at each annual meeting of the board, prepare and submit to the board a carefully prepared statement of the probable amount of income, as near as may be, of the university and all its departments for the year following, and the curators shall thereupon make an estimate of the probable expenses of the institution and each of its departments for the ensuing year, based upon the statements above mentioned, and make the necessary appropriations to meet said expenses for the current year; and in no instance shall the board of curators create any indebtedness in any one year above what they can pay out of the annual income of said year."

Under Section 10,791, supra, it becomes the duty of the president and treasurer of Lincoln University to prepare and submit to the board at each annual meeting a statement of the probable income of the university, and based upon said statement, the board is required to estimate the probable expenses not only of the institution, but also each of its departments, for the ensuing year. The board then is required to allocate the available funds as to meet the expenses for the current year, and in no instance can it create an indebtedness for any one year above what they can pay out of the annual income of said year.

To illustrate, if the Board of Curators has made an allocation for the operation of the university and its respective departments for the year 1943, it cannot for any reason take funds allocated by the board for the year 1943 in order to complete prospective operations for the year 1944, if by such transaction of funds an indebtedness would be created in 1943. The legislature contemplated that the institution and its respective departments be operated on an annual basis and that it stay within its income for the particular year. The intention obviously is that there be sufficient funds available to fully complete a course of instruction for any given year.

We are of the opinion that the Board of Curators of Lincoln University must so allocate the funds available to the institution and its respective departments for any given year so as to permit standard and acceptable courses of instruction to be offered in a given year without the creation of an indebtedness for that particular year.

IV

We now pass to a consideration of your third and fifth statements, and will treat them as one.

The board should not, nor would it want to, offer a course of instruction that was so limited by lack of funds as to permit only a partial and incomplete presentation of the subject matter. The board, upon finding that funds will not be available to carry on any school, department or course of instruction for a given year, has no alternative but to discontinue same for that year. The duty rests upon the board in such instance to eliminate such courses of instruction as it deems necessary to permit it to operate within its income for a particular year.

We are of the opinion that the Board of Curators of Lincoln University can provide and maintain only those schools, departments and courses of instruction as they have funds available

Dr. Sherman D. Scruggs

-8-

December 3, 1943

and which will permit the offering of acceptable and adequate standards of instruction. It is our further opinion that if in considering the schools, departments and courses of instruction to be offered and maintained it be found necessary to reorganize or discontinue any of such schools, departments or courses of instruction by reason of lack of funds, the board may in the exercise of its discretion discontinue same.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

MW:NH

COUNTY COURTS:) County court may designate an emergency bridge
COUNTY BUDGET:) fund to Class 5 of the county budget and make
transfers to provide available funds for aid to
special road districts.

March 1, 1943.



Hon. Eldred Seneker
Prosecuting Attorney
Mt. Vernon, Missouri

Dear Sir:

The Attorney-General wishes to acknowledge receipt of your letter of February 16, 1943, in which you request an opinion of this Department. Your letter of request reads as follows:

"The county court of Lawrence County, Missouri, has asked me for an opinion as to what funds are available to assist special road districts and repair and build bridges as provided in Section 8688 and Section 8534, Revised Statutes of Missouri, 1939.

"In reading Section 10911, R. S. Mo. 1939, which gives the classification of expenditures and their order under the budget law, I find in class 3, provision for repair, upkeep and replacement of bridges but none of this fund shall be used in a special road district.

"Due to the conflict in these Sections, I am unable to give the court more than a curbstone opinion and I would not want to back that up myself.

"I find in the county clerk's office of date April 1, 1942, the following court order:

"O R D E R

"Upon the advice of the Prosecuting Attorney it is hereby ordered by the

court that \$2,000.00 of County revenue be and it now is transferred from class 5 to 6. This is done to take care of an emergency that might arise, such as a bridge wash out, and the court would have to assist the road district in rebuilding.'

"I cannot see that the law gives the court this right, however I may be wrong.

"The county has sufficient money to aid in building, maintaining and repairing roads and bridges. At the present time the county has revenue of approximately \$43,000.00 with no indebtedness, I am informed. This amount is classified under the budget as follows:

"Class 1	\$5,400.00	approximately
Class 2	5,700.00	"
Class 3	3,000.00	"
Class 4	22,000.00	"
Class 5	6,700.00	"
Class 6	245.00	

"This balance is from last December collections.

"Class 5 under Section 10914 provides for contingent and emergency expense and also provides for the transfer from other classes to 5.

"Can a county court designate an emergency road and bridge fund in this class and make any transfers to that fund to provide available funds for assisting road districts and repairing bridges etc. as provided in Sections 8688 and 8534?

"I kindly ask your opinion in this matter and any information concerning how to aid road districts, if possible, will be greatly appreciated."

The county courts of the various counties in the State of Missouri are empowered to aid special road districts in the

construction, maintenance and repair of bridges and culverts by Section 8688, R. S. Mo. 1939. This section provides as follows:

"Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district: Provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

This being true the next question is, from what fund shall this aid be furnished? In order to arrive at a solution to this problem it is necessary to study the budget law of the State of Missouri as set out in Section 10911, R. S. Mo. 1939, and as amended in the Laws of Missouri for 1941, page 650. Of this law, only two classes are of any consequence, in so far as the question under consideration is concerned. These classes are No. 5 and No. 6. Class 3 of the budget law provides for an amount to be set aside for the purpose of upkeep, repair and replacement of bridges on other than State highways, but specifically excepts bridges in special road districts. Therefore, that class cannot apply.

Classes 5 and 6 of the budget law are as follows:

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent

and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

Apparently it was the intention of the county court in this case to furnish a fund to be used for the aid of special road districts in cases of emergency, such as the washing out of a bridge as provided in their order. That would be the only manner in which such funds placed in Class 5 could be used. This Department rendered an opinion on June 21, 1935, holding that aid to a special road district could only be furnished from Class 6, but in that case the question of an emergency did not arise. In our instant case the question seems to relate to an emergency.

The purpose of Class 5 is very clear and can be readily understood by reading its provisions. It is a "contingent and emergency" fund. We believe that if the County Court wishes to set up an emergency fund to be used in a case such as this one, to-wit, for the repair of bridges, that they have the authority so to do. However, if they contemplate such an emergency, it should be shown that they intend to use a certain amount for such purposes. This is provided under Section 10914, R. S. Mo. 1939,

March 1, 1943

which in part prescribes the following:

"Class 5: Contingent and emergency expense.--The County court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the Court proposes the funds in this class shall be used, shall be shown."

It will also be noted that the County Court may transfer surplus funds from Classes 1, 2, 3 and 4 to Class 5 to be used as a contingent or emergency fund. Apparently, the transfers mentioned above may be made at any time an emergency arises. However, there is no provision in Class 6 for transfer of funds from other classes to it. Furthermore, the court cannot pay any funds from Class 6 unless there is actually in hand, in cash, funds sufficient to pay all claims provided for in the first four classes, together with any expense incurred under Class 6 and only then after outstanding warrants constituting legal obligations have been paid.

There could be no purpose for transferring funds from Class 5 to Class 6 for the purpose of using such funds in an emergency, since emergencies of this kind are to be taken care of from funds allocated to Class 5. Further, any funds transferred could not be expended except under the circumstances set out in the preceding paragraph.

Conclusion

Therefore, it is the opinion of this Department that the county court may set up a fund to be used in cases of emergency to aid special road districts in Class 5 of their budget and may make transfers to such fund for that purpose. They must, however, designate for what this fund is to be used.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

TAXATION: Appointee holds until the successor
qualifies. Penalties should not be
COUNTY COLLECTOR: charged when payment of taxes cannot
be made.

March 23, 1943

Honorable Joseph A. Sherman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

The Attorney General acknowledges receipt of your request for an official opinion, dated March 17, 1943, in reference to the status of the present county collector of Buchanan County. Your request consists of two questions:

I

Your first question reads as follows:

"Under the foregoing circumstances we should like your opinion as to whether there is any legal necessity for Mr. Van Andle to be re-appointed, and to furnish a new bond, to cover the term beginning March 1, 1943, or whether Mr. Van Andle's appointment made in January, and the bond which he then gave, are sufficient to authorize him to continue to serve as County Collector until the next general election and until the one then elected as collector has qualified according to the statutes."

Section 11055 R. S. Missouri, 1939, reads as follows:

Honorable Joseph A. Sherman (2) March 23, 1943

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Under the above section it will be noticed that the county collector, when elected, holds his office for four years, and until his successor is duly elected and qualified.

Section 11056 R. S. Missouri, 1939, partially reads as follows:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: * * * * *

Section 11509 R. S. Missouri, 1939, reads as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

Under the above section the governor appoints, whenever there is a vacancy in the office of county collector, and the appointee continues in office until the first day of March next following the first ensuing general election, at which said general election a person shall be elected to fill the unexpired portion of such term. The reason why the date is different than in the body of the section is by reason of the proviso in the section.

Under the above quoted portion of Section 11056, supra, it is necessary that the collector should give bond before entering upon the duties of his office. The giving of the

Honorable Joseph A. Sherman (4) March 23, 1943

bond is part of his qualification.

Section 11073 R. S. Missouri, 1939, partially reads as follows:

"The terms for which collectors are elected shall expire on the first Monday in March of the year in which they are required to make their last final settlement for the tax book which was to be collected by them. * * * * *

Under the above partial section the term of a county collector terminates on the first Monday in March, in the last year of their term. The appointment of the present collector of Buchanan County began, according to your request, on January 23, 1943, which was after the election of Jim Wells, the former county collector who was elected in November of 1942, and who resigned from his office on January 16, 1943. It has been held that the office of the county collector expires on the first Monday in March during the last year of his term, and not on December 31, as most officers' terms expire. (State ex rel v. Herring, 208 Mo. 708, 106 S. W. 984.)

Your inquiry is whether or not a new appointment should be made after March 1, 1943, at which time the first term of the former county collector expired. You also ask whether or not a new bond should be given to cover the duties and qualifications of the new term beginning March 1, 1943.

Since Section 11055, supra, provides that the county collector should hold office until his successor is duly elected and qualified, the appointee holds office until the electee of the November election qualifies.

Section 5, of Article XIV of the Constitution of Missouri, reads as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

By reason of the above section of the Constitution the legislature enacted Section 12820 R. S. Missouri, 1939, which reads as follows:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Under the above section an appointed officer holds his office until his successor is elected or appointed, commissioned and qualified. That the appointed, or elected officer holds office until the successor is duly elected, or appointed, commissioned and qualified, was held in the case of Langston v. Howell County, 79 S. W. (2d) 99, pars. 3-4, and State v. Brown, 274 S. W. 965, par. 1.

Also, in your first question you ask whether it is necessary to furnish a new bond to cover the term beginning March 1, 1943, and whether or not the bond given when first appointed is sufficient to authorize him to serve as county collector until the next general election, until the one elected has qualified according to the statutes.

The facts set out in your request result in a very peculiar situation, for the reason that the resignation of Jim Wells, which was given on January 16, 1943, after his election for the new term in November, (which term began on March 1, 1943), and the resignation was not specific enough to state the present term and the term beginning March 1, 1943. In any event, according to the authorities above set out the present appointee

Honorable Joseph A. Sherman (6) March 23, 1943

holds office until Jim Wells, who was elected for a term beginning March 1, 1943, qualifies.

We find no statute which limits the time in which he shall furnish bond as is set out for the qualification of the county treasurer.

As to the bond given by the new appointee, it is a question of fact as to the form of the bond. If the bond merely is for the term ending March 1, 1943, a new bond should be given, but, if the bond is for the full term that he is holding the office as county collector, a new bond is not necessary, for the reason that he holds office until his successor is elected, appointed and qualified.

CONCLUSION

It is, therefore, the opinion of this department that at this time there is no legal necessity for Mr. Van Andle to be re-appointed as county collector to cover the term beginning March 1, 1943.

It is further the opinion of this department, that if Jim Wells, the former county collector, who resigned his office on January 16, 1943, qualifies at any time between now and March 1, 1947, he will assume office as county collector. We would suggest, however, that if Jim Wells intends to abandon the office of county collector that he give another resignation in the nature of a refusal to qualify for the office, so that a successor can be elected at the next general election which will be held in November, 1944.

II

Your second question reads as follows:

"There is one more question on which we should like your opinion. After Mr. Well's resignation, the County Clerk took possession of the tax books for the purpose of making an abstract of the unpaid taxes, as provided by law. That work is continuing, and will not be completed until some time after April 1, 1943 - probably during the first week in April. The only work Mr. Van Andle is handling now is the collection of State Income Tax.

"Assuming that the abstract of unpaid taxes will be completed and the tax books turned over to Mr. Van Andle on April 1, 1943, what penalties and interest should be collected by Mr. Van Andle during April on taxes for 1942 or prior years which were delinquent on January 1, 1943? Is the answer any different if the books are not turned over until after April 1, 1943, so that the tax payers do not have a full month in which to pay? If the delinquent taxes are not paid in April, then what rate of interest or penalty should be charged on them in May and ensuing months?

"In other words, assuming that penalties should not be charged for the period during which the office was not accepting tax payments, are such penalties permanently waived, so that they are not collectible at any time during the year, or do they attach if payment is not made during April, for instance? Would the interest and penalties to be collected in May, 1943, be the same that would have been collectible in the absence of a shut down in the office; or should the penalties that normally would have accrued because of non-payment during January, February, and March be left out of

Honorable Joseph A. Sherman (8) March 23, 1943

consideration at all times hereafter when calculating the total amount to be collected?"

In answer to your second question we are enclosing a copy of an opinion rendered by this office on January 7, 1943, to Miss Hazel Palmer, County Collector, Pettis County, Sedalia, Missouri, in which we held that penalties and interest on taxes may not be charged in cases where the taxpayer was unable to pay the taxes before they became delinquent, on account of the death of the collector. This opinion is based upon Section 11075 R. S. Missouri, 1939, which not only mentions the death, but also the resignation, removal or other disability of any county collector, during the time the tax books are in his hands. Under the facts in your request, the only difference is that Jim Wells has resigned. In the enclosed opinion the county collector died. Under the holding in the cases cited in the opinion enclosed, and under the rules set out by Corpus Juris, a penalty should not be imposed for the non-payment of taxes, where it was impossible for the taxpayer to pay his taxes. In your request you ask, "Would the interest and penalties to be collected in May, 1943, be the same that would have been collectible in the absence of a shut down in the office; or should the penalties that normally would have accrued because of non-payment during January, February, and March be left out of consideration at all times hereafter when calculating the total amount to be collected?"

You state that Jim Wells, the county collector, resigned from his office on January 16, 1943. A penalty of one per cent had been added at that time which should be collected when the books of the county collector have been returned to him for the payment and receipt of delinquent taxes, but, under the enclosed opinion, we do not believe that the taxpayer should be compelled to pay the penalties for the months of February and March, and such months should be left out of consideration at all times hereafter when calculating the total amount to be collected. However, to protect the present county collector, and in view of the fact that he may be sued upon his bond as set out under Section 11124 R. S. Missouri, 1939, where he is charged with taxes, penal-

Honorable Joseph A. Sherman (9) March 23, 1943

ties and interest shown on the record of the list of delinquent lands and lots, we think that a test suit should be filed under the facts set out in the second party of your request. We find no decision on this matter, except the authority set out in the enclosed opinion.

CONCLUSION

It is, therefore, the opinion of this department that penalties should not be charged for the period during which the office was not accepting tax payments, and such penalties should be permanently waived and left out of consideration at all times hereafter when calculating the total amount to be collected.

It is further the opinion of this department, that since the one per cent penalty had accrued January 1, 1943, and Jim Wells, the county collector, resigned from his office on January 16, 1943, the one per cent should be collected and calculated for the month of January, 1943.

It is further the opinion of this department, that if the books are turned over to the present county collector, during the month of April, and the taxpayers do not have a full month in which to pay the taxes that month, the one per cent penalty, nevertheless, should be assessed and collected for that month, and for ensuing months, at the rate of interest set out in Section 11124 R. S. Missouri, 1939.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

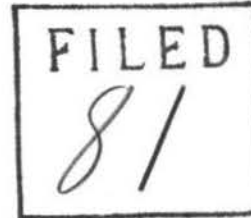
APPROVED BY:

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

JUVENILE DELINQUENTS: Section 9004, R. S. 1939 does not apply.

March 29, 1943



Honorable Oliver Senti
Associate City Counselor
St. Louis, Missouri

Dear Mr. Senti:

Under date of March 24, 1943, you wrote this office requesting an opinion as follows:

"This Department has been requested to advise the Comptroller whether the State or the City is required to pay the cost of transporting to the Training School at Boonville, boys committed as delinquents when the charge of delinquency is based on an act which is a felony.

This inquiry involves the construction of the statute which should be uniform throughout the State, for which reason we would like to have you rule on the Comptroller's question.

Section 9004 R. S. Mo., 1939, provides:

"In all cases of conviction of felony, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and

of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the Missouri training school for boys shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said Missouri training school for boys and in returning therefrom, to be paid by the state or county, as the case may be."

The statute is silent as to who shall pay the cost of delivering to the School persons who are committed as delinquents. From the words we have underscored, it is clear that the General Assembly intended that the Sheriff or other person charged with this duty should be compensated, and having provided for such compensation, the Legislature must have intended that it should be paid, either by the State or the county.

Where the legislative intent can be ascertained (and it appears from the statute that the Legislature did intend that the person transporting such delinquents should be paid), the courts will read into the statute whatever is necessary to effectuate the legislative intent. The Legislature must have known that boys who have not been convicted, either of a felony or a misdemeanor, were also committed to the School as delinquents under the Juvenile Court Act. Since the case of convictions the cost is allocated according to the nature of the offense, we think it is reasonable to conclude that between the State and the counties it was also intended to allocate the cost of delivering boys committed as delinquents on the same basis;

March 29, 1943

that is, in the case of those committed as delinquents because of the commission of an act which is a felony, it should be charged to the State, and those committed because of acts not amounting to a felony, it should be charged to the county.

I have suggested to the Comptroller that he continue to deal with these costs as usual until your office construes the statute."

Section 9004 R. S. Mo., 1939, set out in your letter makes provision for paying the costs of transportation to the Missouri training school for boys, persons who have been convicted of offenses under the criminal code of the State. In this connection it is desired to call to your attention the following other sections of the statutes, Section 9700, Article 10, Chapter 56, and Section 8998 of Article 2, Chapter 48.

A conviction under the criminal code is entirely different from an adjudication of juvenile delinquency under the statutes pertaining to Juvenile Delinquents. State ex rel. Matacia v. Buckner, 254 S. W. 179, 1. c. 181:

"A proceeding under the act, the aim of which, as in this case, is the exertion of the state's power, *parens patriae*, for the reformation of a child and not for his punishment under the criminal law, is not a criminal case, and the constitutional guaranties respecting defendants in criminal cases do not apply. This is obviously true and is the rule of the decisions. In *re Sharp*, *supra*, and cases cited; *Com. v. Fisher*, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92; *State v. Brown*, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691,

36 Am. St. Rep. 651; Pugh v. Bowden, 54 Fla. 302, 45 South. 499, 14 Ann. Cas. 816; Ex parte Bowers, 78 Ore., loc. cit. 395; In re Powell, 6 Okl. Cr. loc. cit. 507 et seq., 120 Pac. 1022; Ex parte Januszewski (C. C.) 196 Fed. 123; U. S. ex rel. v. Behrendsohn (D. C.) 197 Fed. 953; Ex parte Bartee, 76 Tex. Cr. R. loc. cit. 287 et seq., 174 S. W. 1051. In this case the alleged criminal act of relator is not set up as a charge of crime and a predicate of punishment under the criminal law but merely as the thing which brings relator within the definition of "delinquent children" in the act, and shows he is within the class over which the state is authorized to exert its power of quasi parental control. Childress v. State, 133 Tenn. loc. cit. 123, 179 S. W. 643. The informations are so drawn. The proceeding is not transformed into a prosecution for crime by the mere adoption of practice in criminal cases as far as applicable under the act. The purpose and substance of the act remain as before. Convenient machinery at hand is borrowed by the act to avoid the necessity of setting up independent machinery of its own."

Also the following brief quotation is taken from the case State ex rel. Shartel v. Trimble et al., 63 S. W.(2nd) 37 1. c. 39:

"Section 14136, R. S. Mo. 1929 (Mo. St. Ann. -14136 provides: "Any disposition of any delinquent child under this article, or any evidence given in such cases shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this article."

This proviso clearly indicates that any disposition of a case in a juvenile court shall not be considered a conviction of crime. It protects the child, in that the

adjudication of delinquency cannot be later referred to in any proceeding, either civil or criminal, except in a subsequent case in the juvenile court. A conviction of crime under the law may always be used against a person in either civil or criminal cases. * * *

The provisions of the statutes relating to delinquent juveniles are found in Article 9 and 10, Chapter 56, R. S. Mo. 1939; Article 9 treats of the procedure in counties having a population of over 50,000 inhabitants and the provisions of this Article apply to the City of St. Louis, Section 9674:

"* * * * For the purpose of this article, the city of St. Louis shall be considered a county within the meaning of this article. In counties where there are or may be more than one circuit judge, the judges of the circuit court in such counties shall designate one of their number, whose duty it shall be to hear and determine all cases coming under this article until there be another judge so designated:* * * *

In the same Article, Section 9676, directing the method of serving the summons and the matters of collecting the costs, contains the following:

"* * * and the cost of the proceedings may, in the discretion of the court, be adjudged against the petitioner, or any person or persons summoned, or appearing as the case may be, and collected as provided by the law in civil cases. All costs not so collected shall be paid by the county.* * * *

A similar provision concerning the payment of costs is found in Section 9703 of Article 10, Chapter 56, which

March 29, 1943

prescribes the Juvenile procedure in counties having a population of less than fifty thousand (50,000) inhabitants.

The rule of statutory construction mentioned in your letter concerning the supplying of words omitted is recognized. This rule is only applicable in cases where the omissions are apparent and it is necessary in order to carry out the Legislative intent, and may not be used when it may be avoided by any reasonable construction of the statute.

Section 9004, referred to in your letter was first enacted as Section 31 of a law enacted in 1917, Laws of 1917, page 155, for the purpose of revising the laws relating to the penal institutions. Section 9676 supra, was enacted in 1911, Laws of 1911, page 172. The two sections treat of entirely different matters. When what is now Section 9004 was enacted, the law pertaining to the juvenile procedure had been in existence for several years. If the Legislative intention had been to make the provisions of the law concerning the transportation of persons convicted under the criminal code to the Missouri Training School for Boys, apply to persons committed under a civil proceeding, it would have been very easy to do so.

Section 9695, Article 9, Chapter 56, provides as follows:

"Nothing in this article shall be construed to repeal any portion of the law relating to the state industrial home for girls or the Missouri training school for boys; and in all commitments to either of said institutions the law in reference to said institutions shall govern the same."

Under this section in cases involving convictions under the criminal code, the provisions of Section 9004 supra would apply. But as previously pointed out, this provides directions only in cases of convictions under the criminal code and does not make any direction about persons adjudged delinquents.

Hon. Oliver Senti

-7-

March 29, 1943

CONCLUSION

By no stretch of the imagination could the provisions of Section 9004 R. S. Mo. 1939, be construed to make the State liable for the cost of transporting to the Missouri Training School for Boys, a juvenile committed to such institution as a delinquent.

Respectfully submitted,

W. O. Jackson
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

RECORDER OF
DEEDS:

Recorder has no authority to note upon the
records a partial release of property contained
in a mortgage.

April 28, 1943



Mr. John P. Sherrod,
Recorder of Deeds,
Jackson County,
Kansas City, Missouri.

Dear Mr. Sherrod:

This will acknowledge receipt of your letter of April
22, 1943, which is as follows:

"The volume of requests for partial re-
leases of filed chattel mortgages has
increased greatly during the past year
and, since the statutes are not clear as
to authority of Recorders to make this
class of partial release, I am herewith
requesting an opinion from your depart-
ment on the same.

"Should we require that chattel mortga-
ges be recorded rather than filed when
partial release is to be made?

"Please state correct method for making
partial releases and whether in each in-
stance of a partial release, presentation
of original note, or notes, is required.

"We have found, on inquiry, that the re-
quirements of other Recorders in the
state vary, particularly as to requiring
presentation of original notes.

Section 3489 Mo. R. S. A., 1939, deals with the method
whereby a recorder is to satisfy the record on chattel mort-

gages. Said section is as follows:

"Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following methods:

- "1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.
- "2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.
- "3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.

"When any of these provisions have been complied with, it shall be the duty of

the recorder to enter in a column for that purpose the word 'satisfied,' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage: Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register." (Underlining ours.)

Adverting to that portion of the statute which we have underlined above, it is to be noticed that the three methods prescribed are all conditioned upon the mortgage being "satisfied" or "fully paid and satisfied" or "paid and satisfied." In *Rogers v. Davis*, 194 Mo. App. 378, 388, the Court, in speaking of this section, stated, "The statute merely makes provisions for releasing of record chattel mortgages that have been satisfied."

This ruling taken in connection with the underlined portions of the statutes clearly indicates that the law does not contemplate that a recorder may make partial releases or satisfaction of chattel mortgages, and the statutes making no provision for such partial release or satisfaction, the recorder has no authority to undertake to make a note of such release or satisfaction upon the record.

If the mortgagee desires to release from his lien certain property contained in the mortgage then the proper way to do so is to satisfy the mortgage in full and take back a new mortgage on the property on which the lien is desired to be retained.

Mr. John P. Sherrod

-4-

April 28, 1943

CONCLUSION

It is, therefore, our opinion that a recorder of deeds is not authorized under the law to note upon the records of his office the fact that a mortgagee has released from the lien of his mortgage a portion of the property contained therein.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:FS

TAXATION: Personal property in Missouri owned by soldier, who is nonresident of this State, and only here in compliance with military orders, is not taxable in Missouri.

May 4, 1943



Colonel Frank E. Shaw
Seventh Service Command
Office of the Judge Advocate
Omaha, Nebraska

Dear Colonel Shaw:

On April 20, 1943, you requested this department to supply you with any rulings we had made relative to the tax exemption granted in Section 10937 R. S. Mo., 1939, to "all persons belonging to the army of the United States." On April 22, 1943, we supplied you with copies of four opinions on that subject, they being opinions rendered to John P. Shreves, May 18, 1934; William H. Sapp, September 17, 1936; Andy W. Wilcox, January 4, 1937; and Phil H. Cook, December 18, 1941. Only the first two of said opinions attempt to discuss this question. The other two merely rely upon the first two as authority for the conclusion reached.

The Shreves opinion dealt with the effect of such exemption on personal property of "army personnel on temporary duty (detached service) from the army to duty in the State of Missouri". The Sapp opinion dealt with the same question as applied to "members of the R. O. T. C." We concluded that the exemption in question only exempted the "person" in the army from taxation, and that since personal property taxes are taxes on said personal property rather than taxation of the "person" who owns or holds the property, the exemption granted in Section 10937, supra, did not operate to exempt from taxation the personal property of a person in the armed forces of the United States.

May 4, 1943

Since it is of importance in connection with the question presently to be stated, we note now that neither of the above opinions discloses whether the persons in the armed forces contending for the exemption were legal residents of Missouri. The inference is that in the Shreves opinion the person was not a legal resident of Missouri, while in the Sapp opinion the inference is that the persons involved were legal residents of Missouri.

On April 24, 1943, you called our attention to the Act of Congress of October 6, 1942, and asked that we reconsider our opinions in the light of that act. Said act is as follows (50 U. S. C. A., App. 574):

"For the purpose of taxation in respect of any person, or of his property, * * * * * by any State, * * * * * or political subdivision * * * * * such person shall not be deemed to have lost a residence or domicile in any State, * * * * * or political subdivision * * * * * solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, * * * * * or political subdivision * * * * * while, and solely by reason of being, so absent. * * * * *

This Section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to the date of the enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942."

This section was adopted as a part of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. A., App. 501, et seq.), and applies to the persons in the armed forces designated in said act.

Sections 10936, 10937, 10939, 10940 and 10950 R. S. Mo., 1939, make it clear that personal property within this State, that is owned by a nonresident is taxable here, just as is personal property not in this State that is owned by a resident of Missouri. It was said in State ex rel. Union Electric Light and Power Co. v. Baker, 293 S. W. 399, 316 Mo. 853, 858:

"It is the well settled policy of our law that taxes shall be levied and collected for public purposes on all property within the territorial jurisdiction of the State, except that expressly enumerated as exempt.
* * * * *

Section 10939, supra, applies particularly to the property not within the state but which is owned by a resident of Missouri.

By force of the superior power of Congress as exercised in 50 U. S. C. A., App. 574, supra, it is clear that the conclusions reached in our opinions referred to herein must be modified as long as that act is in effect to the extent that Missouri may not now impose a tax on personal property brought into Missouri by a person in the armed forces who is located in Missouri by reason of compliance with military or naval orders when said person is not a legal resident of this State. Section 574, supra, was properly enacted under the power vested in Congress to declare and prosecute war (Twitchell v.

Colonel Frank E. Shaw

-4-

May 4, 1943

H. O. L. C., 122 P. 2d 210) and, as has been said: We have then an assertion of federal power * * * * * which by reason of the supremacy clause excludes any exercise of a conflicting state power." Penn Dairies v. Milk Control Commission, 63 S. Ct. 617, 628.

We do not understand the above act to affect the right of the State to tax personal property of legal residents of this State who are in the armed services, but rather it seems that said act would prevent a resident of Missouri from asserting that he had acquired a residence elsewhere and that, therefore, property taken with him was not subject to being taxed in Missouri, when he is absent from the State of Missouri, his legal residence, solely because of his compliance with military or naval orders.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:FS

ROADS AND BRIDGES: Moneys in contingent fund may be used for roads in common road districts.

September 1, 1943

Hon. E. O. Shelton
County Clerk
Randolph County
Huntsville, Missouri



Dear Mr. Shelton:

Your letter of August 30th addressed to the Attorney-General has been received and has been referred to me. In your letter you request an opinion of this office, which request, omitting caption and signature, is as follows:

"The members of the Randolph County Court have instructed me to write you and ask for an opinion about whether it is legal to use money from the Contingent fund to pay for material or labor used in road work.

"As you already know we have a .22 Special Road Tax and .01 Road & Bridge Tax which is divided according to assessed valuation in our eight Special Road Districts and two Common Road Districts.

"Our Road District #2 is quite a bit in debt and would like to know if it would be legal to use money out of the Contingent fund to pay off this indebtedness."

We note from your letter that you have in your county eight special road districts and two common road districts and your letter does not state in which class road district No. 2 is. Therefore, for the purposes of this opinion, we will assume that Road District No. 2, which is in question in this opinion request, is a common road district.

The money to be used for the upkeep of roads in the various counties can be obtained by three different methods as far as common road districts are concerned. The first method is that set out in Section 8522, R. S. Mo. 1939, in subsection "(c)", which prescribes the following:

"For the purpose of carrying out the provisions of this article there is hereby levied in addition to all other road tax upon all real estate not incorporated within the limits of any city, town or village a special benefit tax of twenty cents per hundred dollars valuation on all land abutting upon or lying within one-half mile of any public road, and ten cents per hundred dollars valuation on land lying more than one-half mile and up to one mile of any public road and five cents per hundred dollars valuation on all land lying more than one mile and up to one and one-half mile from any public road, which benefits shall be spread upon the road overseer's books by the clerk of the county court giving the name of the owner of each tract as it appears upon the assessor's books the description of the land and the benefits charged set opposite each tract which benefit tax books with blank receipt books shall be delivered to the road overseers of their respective districts on or before the 15th day of May of each year, which books may also contain the names of those subject to poll tax; the said overseers before entering upon their duties shall give a good and sufficient bond payable to the county treasurer in a sum equal to the amount of benefits charged against the land in their districts: Provided, that no tract of land lying within the radius of a public road as prescribed in this section shall be taxed in excess of twenty cents on the hundred dollars valuation for any one year."

The money thus obtained under the above cited statute is placed under the control of the road overseer of the common road district from which the money is collected. He is, of course, bonded for the faithful performance of his duties pertaining to the disbursements of these particular funds. These funds are all used for the upkeep and maintenance of the roads in the particular district from which they are obtained.

Another method by which funds may be obtained for the upkeep of the roads in the county is provided for in Section 8526, R. S. Mo. 1939, which is as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

This is the statute under which the general road and bridge fund of the county is set up. This fund can be supplemented by a special tax which can be levied in conformity with Section 8527, R. S. Mo. 1939, which provides the following:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion

of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

In an opinion written by one of the Assistants in this department in April, 1942, it was held that if a common road district depleted its funds for the upkeep of roads in such district, that the county court could augment such funds from money from the county road and bridge fund. In such opinion it was stated that the amount collected by the overseers in the various common road districts was never sufficient to take care of the maintenance of the roads and in view of the fact that such overseer was acting for the county in this matter that the county was then permitted to take money from the road and bridge fund to aid and assist the common road districts in the maintenance

and upkeep of the different roads. Consequently, this additional money paid by the county must come from funds collected under the provisions of Section 8526 and 8527, R. S. Mo., 1939.

We are now confronted with the question as to which fund or class, as set up in the county budget, such additional funds are to be taken. Shall they be paid from Class 5, which is the contingent fund, or from one of the other five classes set up in the aforesaid budget?

In the statutes of 1939 we find Section 10911 which related to the classification of expenditures as set out in the various county budgets. The third class set out therein provided as follows:

"Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

In examining the statutes of 1939 we further find the following provision under Section 10914 in the classes of expenditures which also applies to the county budget, and we find that Class 3 under such statute provides as follows:

"Class 3: Repair and upkeep or replacement of bridges on other than state highways and not in any special road district. List bridges."

It will be noted that in the two preceding statutes, the provisions only specify "bridges," but in 1941 House Bill No. 466 was introduced and passed, repealing Sections 10911 and 10914, supra, and in lieu thereof set up two new sections numbered the same as the above repealed sections. These new sections provide the following as to Class 3:

(Section 10911, Laws of Mo., 1941, p. 650)

"Class 3. The county court shall next

set aside and apportion the amount required, if any, for the unkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527, R. S. Mo. 1939. This shall constitute the third obligation of the county."

(Section 10914, Laws of Mo., 1941, p. 652)

"Class 3. Repair, upkeep and construction of roads and bridges on other than state highways and not in any special road district. List roads and bridges to be constructed."

It is apparent from the action of the Legislature above that they intended that all moneys to be paid for the repair and maintenance of bridges and roads was to be paid from Class 3 under the county budget. Therefore, as long as this particular class has money to its credit, any aid and assistance in the maintenance of the roads in the common road districts would be taken from Class 3 in the county budget.

We also find that Class 5 in the county budget, and also reported at page 652 of the Laws of Missouri, 1941, provides the following:

"Class 5. Contingent and emergency expense.--The county court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the court proposes the funds in this class shall be used, shall be shown."

If the funds in Class 3 aforesaid should be depleted and it is necessary that roads in one or more of the common road

September 1, 1943

districts be repaired, and such condition is an emergency, it is our opinion that the county court has the authority to allocate out of the contingent fund sufficient moneys to repair the roads in the common road districts. However, the funds in Class 3, as set up in the budget, must be used before the contingent or emergency measure funds under Class 5.

Conclusion.

Therefore, it is the opinion of this Department that moneys can be paid from the contingent fund for the maintenance of roads in a common road district, but only after the funds allocated to Class 3 under the county budget have been depleted.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

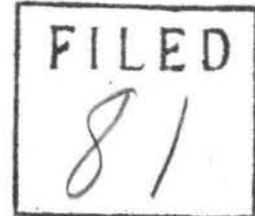
ROY MCKITTRICK
Assistant Attorney-General

JSP:EG

TAXATION-) County Court may compromise taxes
(and include penalties and interest
COMPROMISE OF) in the compromise.
TAXES. (

September 10, 1943

Honorable J. Ben Searcy
Prosecuting Attorney
Shannon County
Eminence, Missouri



Dear Sir:

This is in reply to yours of recent date on the question of whether or not the compromises and settlements of back taxes by the County Court include penalties and interest on such taxes, and whether or not such interest is considered as penalty.

The answer to your request is based upon a construction of the statute.

Section 11122 R. S. 1939, which provides for compromise settlements of back taxes reads as follows:

"Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said "back tax book" or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said "back taxbook" or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said "back tax book" or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall

compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

This section does not specifically mention penalties and interest as a part of the settlement, but it does state that the compromise "shall have the effect to release said lands from the lien of the state and all taxes due thereon." If the lien for the taxes is extinguished by the compromise settlement, then if the compromise settlement did not include the penalties and interest on such taxes, they would be of no value because the state's lien is extinguished by the compromise settlement.

Referring to the clause in said Section 11122, which reads as follows:

"*** and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot.",

it would appear that the court in making the compromise settlement that it takes into consideration the "Amount" due against the land, which, of course, would include the penalties and interest.

On the question of whether interest on back taxes is considered penalties we find that Sec. 11085 R. S. Mo. 1939, which relates to interest and penalties on delinquent taxes provides in part as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January, then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124.***"

The lawmakers in this section called the additional tax a penalty.

Section 11124 R. S. 1939 fixes the rate of penalty for delinquent taxes.

In the case of State v. Kolin, 61 S. W.2d. 750, 1.c. 753, the court held that all of the charges added on account of failing to pay taxes when due are essentially penal in nature.

So, reading the foregoing provisions of Sec. 11085, which provides for the additional tax for delinquents, and calls it a penalty, and referring to Sec. 11122 which provides for a compromise of taxes, we think the lawmakers in referring to "taxes" in said Sec. 11122 intended to include in that term the "additional taxes" as penalties imposed under Sec. 11085 supra.

C O N C L U S I O N .

From the foregoing it is the opinion of this department that the interest which the law requires on back taxes is considered as penalty and that the County Court in compromising taxes under Sec. 11122 R. S. 1939, may compromise such additional tax, or penalty or interest, whichever it may be called, along

Hon. J. Ben Searcy

-4-

Sept. 16, 1943

with the other delinquent tax which is being com-
promised.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

TWB:LeC

APPROVED

ROY MCKITTRICK
Attor

TAXATION: Church not required to pay taxes on property used for religious or charitable purposes where the property does not exceed one acre in area.

November 26, 1943



Honorable William E. Shirley
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Shirley:

The Attorney General wishes to acknowledge receipt of your letter of November 24, in which you request an opinion of this Department.

This opinion request, omitting caption and signature is as follows:

"The Catholic church at Kirksville owns two lots. On one of these lots is a church; the other the house in which the priest lives. They did not have as much ground here as they desire and they have bought three lots.

"These three lots have a frontage of 172 feet and are 108 feet deep. The purpose of buying this additional ground was that they desire to build a new church and rectory. These three lots are in the name of the Bishop; as I understand it that is the way they take title to all the church property.

"The assessor has placed those three lots on the books and the assessor contends that the church should pay taxes on the three lots. The church contends that they should not pay taxes.

"Will you kindly advise me as to whether or not those three lots should be taxed."

It appears from the above request that the Catholic church in your city has purchased three lots adjacent to the

lots now occupied by the church and rectory. These three lots appear to have been purchased for the purpose of building a new church and rectory.

The taxation of property of this type is governed by Section 6 of Article 10 of the Constitution of Missouri, which provides as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

It will be noted from the above Constitutional provision that the last sentence states that:

"Provided, that such exemptions shall be only by general law."

Consequently, we examine the Statutes of Missouri and find that Section 10937, R. S. Mo., 1939, provides as follows:

"The following subjects are exempt from taxation: * * *; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

Therefore, we see that by provisions of the Constitution of Missouri, and also by Statutes enacted by the Legislature of the State of Missouri, property which is used for religious purposes with the buildings thereon are exempt from taxation

November 26, 1943

so long as the area of the property does not exceed one acre. This is true so long as the property is located within an incorporated city or town or within one mile of the limits thereof, which appears to be the situation in this case. As a result, it is the opinion of this Department that if the combined property to-wit: the two lots on which the present church and rectory stand and the three lots recently purchased, do not exceed one acre in area, such property is not subject to taxation. Should such property exceed one acre in area, only that part in excess of the one acre would be subject to assessment for taxation purposes.

Respectfully submitted,

John S. Phillips
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

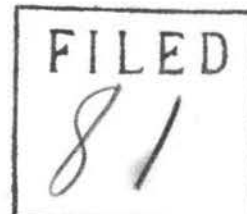
JSP:ir

Mimeo.

MARRIAGE: Under blood test law, person with negative laboratory report need not have physician's certificate that he is free from syphilis; definition of "public health laboratory" as respects free tests.

December 15, 1943.

Mr. John P. Sherrod,
Recorder of Deeds
Jackson County,
Kansas City, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of December 10, 1943, as follows:

"From a reading of the title of C.S. for H.B. No. 45, effective January 1, 1944, and from a reading of Section 3364-A of the Act, it seems to me that no physician's examination is required as a prerequisite for issuance of a marriage license if applicant presents:

"1. A report of a negative laboratory serological test for syphilis, and

"2. An affidavit signed by the applicant that, to his or her knowledge and belief, he or she is free from syphilis.

"Will you kindly advise if this is correct?

"If this is correct, then why should the laboratory make its report to a 'physician', as set out in printed form of State Board of Health enclosed, and not to the Recorder of Deeds. Why should applicants be forced to go to the expense of employing a physician when the act does not so state?

"Is the laboratory at the City General Hospital in the City of Kansas City, Missouri a public health laboratory as defined in the Act, and can it be required to furnish these laboratory tests free of charge?"

Committee Substitute for House Bill No. 45 of the Sixty-second General Assembly appears in Laws, 1943, page 641. As we read said bill, Section 3364-A thereof provides for the issuance of a license to marry under three conditions. The first is when the applicants have a negative serological test for syphilis. The second is when the applicants have a positive serological test for syphilis. The third is when no serological tests for syphilis have been made of the applicants. Section 3364-A (broken down for a better understanding) provides as follows:

"It shall be unlawful for the Recorder of Deeds of any County or City to issue a marriage license to any person -

(Negative Test)

- (1) unless such person presents and files with such Recorder of Deeds a report of a negative laboratory serological test for syphilis, and
- (2) an affidavit signed by the applicant that to his or her best knowledge and belief he or she is free from syphilis; or

(Positive Test)

- (1) unless, in the case of an applicant with a positive test, such applicant presents and files a certificate from a physician duly licensed to practice in the State of Missouri, stating that to his or her best knowledge and belief, after having made a thorough physical examination of such applicant, he or she is not infected with syphilis, or
- (2) if so infected is not in the stage of the disease wherein it is communicable either to the spouse or the offspring,
- (3) which said physician's certificate shall have attached thereto a laboratory report of the test of syphilis made by such laboratory; or

(No Test)

- (1) unless a duly licensed physician presents a certificate stating that one of the applicants for a license to marry is on his or her deathbed and unlikely to consummate the marriage or that an applicant is pregnant.* * *

This statute is so clear that interpretation is not necessary nor even permissible. As has been said: "It is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction." *Cummins v. Kansas City P.S. Co.*, 66 S.W. (2d) 920, 931 (Mo. Sup.). The statute under consideration clearly and definitely authorizes the issuance of the license to applicants with a negative test, upon presentation of the laboratory report of that test, together with the applicant's own affidavit, that he or she does not believe that he or she has syphilis. No requirement is made in the law that applicants with negative tests must get a physician's certificate that they are free from syphilis, and the State Board of Health has no authority to make that requirement. Its authority to make rules and regulations "concerning the affidavits, certificates and other forms necessary" does not grant it license to amend the law and attach an additional restriction on the issuance of marriage licenses to persons having negative tests. Nor can any process of liberal interpretation be invoked in construing the rule making power vested in the Board of Health that will let it accomplish that purpose, for this law is one in derogation of the common^{law} right to marry, and must be strictly construed. *Bostic v. Workman*, 31 S.W. (2d) 218, 220 (Mo. App.).

The certificate of the physician is required when the laboratory test is positive. Where that is so, then the applicant may receive a license, if a physician, irrespective of the positive test, shall, on physical examination, determine and so certify that said person is not infected with syphilis, or shall determine on such examination and certify that said person, even though infected, does not have the disease in a communicable stage. To either of these certificates must be attached the report of the positive laboratory test. Also, in death-bed cases, and cases of pregnancy, a physician's certificate is required in order that the license to marry may be issued without a laboratory serological test for syphilis. All these physicians' certificates are to be made by physicians licensed to practice in the State of Missouri.

Your other question turns on what constitutes a "public health laboratory". Section 3364-A does not define that term but only provides:

"Laboratory tests shall be made free of charge by the laboratory of the State Board of Health or by such other public health laboratory wherever maintained in the State of Missouri, upon the request of a physician or by an applicant.

"For the purpose of this act 'Laboratory' shall mean any private or public health laboratory duly approved by the State Board of Health of Missouri, or by the State Board of Health of any other state of the United States, or by the United States Public Health Service."

We find that the word "public" is defined in 50 C.J. page 845, Section 1, as follows:

"A thing may be said to be public when owned by the public, and also when its uses are public. Thus it has been defined as pertaining to, or belonging to, the people* * *."

In 30 C.J. page 462, Section 2, it is said:

"* * * a public hospital may be defined in general as an institution owned by the public and devoted chiefly to public uses and purposes."

In 32 C.J. page 943, Section 7, it is said:

"A public institution is any organized activity created or established by law or public authority."

We think, under these definitions, that a laboratory maintained in the City General Hospital of Kansas City is a public health laboratory. It is something belonging to the people of Kansas City and created and established by public authority. As such it would be subject to the terms of Section 3364-A respecting free serological tests for syphilis when made in connection with application for a marriage license.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK
Attorney-General.

LLB/LD

SCHOOLS: Qualified voters must vote for County
ELECTIONS: Superintendent in the district in which
they reside.

March 5, 1943

Mr. Glen Simpson
Superintendent
Sullivan County Public Schools
Milan, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
dated March 1, 1943, which reads as follows:

"Since the election of delegates to
the Constitutional Convention is to
be held on the same date as that of
County School Superintendent, there
is a question that I would like to
have answered.

"As I understand it, the delegates
to the Convention are to be elected
at the regular precincts, while the
election for County Superintendent
is to be held in every school district.
May the persons serving as judges and
clerks in the election of delegates,
vote for County Superintendent where-
ever they may be serving even though
it may not be in the school district
in which they reside?"

Section 10418 R. S. Missouri, 1939, reads as follows:

"The annual meeting of each school
district shall be held on the first
Tuesday in April of each year, at

the district schoolhouse, commencing at 2 o'clock p. m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

Under the above section the annual meeting of each school district shall be held on the first Tuesday in April of each year at the district schoolhouse. This annual meeting is a meeting of all of the qualified voters in each special school district.

Section 10419 R. S. Missouri, 1939, partially reads as follows:

"The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:

* * * * *

"To designate their choice, by ballot, for a person to fill the office of county superintendent of public schools."

In reading the two sections, which are unambiguous, it will be noted that only the voters in the district are qualified voters in that district, and for that reason the regular judges and clerks serving in the Constitutional Convention election must vote in their own district for County Superintendent.

Mr. Glen Simpson

(3)

March 5, 1943

CONCLUSION

It is, therefore, the opinion of this department that persons serving as judges and clerks in the election of delegates to the Constitutional Convention in a district other than their own school district must vote for the county superintendent at the annual meeting in their own district in which they reside.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY TREASURER AND COURT

REPORTERS: Court reporter and not county treasurer
preserves official notes of court reporter.

March 5, 1943

Mr. Arthur Singleton
Treasurer of Douglas County
Ava, Missouri



Dear Sir:

Your request for an official opinion, dated March 2, 1943, in reference to the custody of the records of the official court reporter of your district, has been received.

Your main question is whether or not you, as county treasurer, should preserve all of the official notes taken in the circuit court by the court reporter for future use or reference, and whether or not such official notes should be retained by you in your vault.

Section 13798 R. S. Missouri, 1939, reads as follows:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the court house or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Under the above section it is the duty of the county treasurer to keep his office at the county seat, and it is the duty of the county court to provide said county treasurer with suitable rooms and a secure vault for the purpose of keeping his records. We find no provision which provides that the county treasurer shall keep the official notes of the court reporter of the circuit court.

Section 13340 R. S. Missouri, 1939, reads as follows:

"It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

Under the above section, it is the duty of the court reporter, under the direction of the judge of the circuit court, to take all notes in any proceeding before the court and to preserve all official notes taken in said court for future use or reference. Under this section, it is the duty of the court reporter to preserve his notes.

CONCLUSION

It is, therefore, the opinion of this department, that it is not the duty of the county treasurer to preserve the notes of the court reporter in his vault, but it is the duty

Mr. Arthur Singleton

(3)

March 5, 1943

of the court reporter to preserve all of his official notes,
as set out under Section 13340, supra.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED BY:

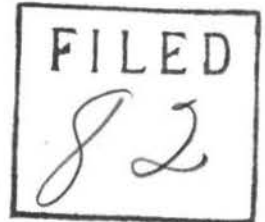
ROY McKITTRICK
Attorney General of Missouri

WJB:RW

VOTER:
FOR RAISE OF
SCHOOL LEVY:

Voter to qualify for voting to raise the annual school levy must have all of the general qualifications as to age and residence, and in addition, must be a resident taxpayer.

March 29, 1943



Mr. Glen Simpson, Superintendent
Sullivan County Public Schools
Milan, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion addressed to this office March 20th.

"The question of whether or not a voter, who is not a taxpayer in the district, may vote to raise the levy in excess of 20¢ has arisen.

"Section 10420 defines a qualified voter without reference to his being a taxpayer.

"Section 10460 states that the levy may be raised by a majority of the voters who are taxpayers in the district.

"Will you please clarify this question for me as soon as possible. I would like to have your opinion before annual school meeting day, April 6th."

The authority for the proposition that the State may prescribe qualifications for voters may be found in the following, Blair v. Ridgley and Thompson, 41 Mo. 63:

"Outside of society, and disconnected with political society, no person has or can exercise the elective franchise as a natural right, and he only receives it upon entering into the social compact subject to such qualifications as may be prescribed by the State or body politic. The State of Missouri having sovereign power to regulate its own internal government, and to prescribe the qualifications which shall authorize any

Mr. Glen Simpson, Superintendent

-2-

March 29, 1943.

inhabitant to exercise the elective franchise therein * * * * *

As to the general qualifications of voters in the State, your attention is directed to Section 11469 R. S. Missouri, 1939, which reads as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people * * * * *

Section 10420 R. S. Missouri, 1939, concerns itself principally with the qualifications of directors for school boards, and further provides and sets out the qualifications for voters within the meaning of the laws applicable to common schools. The question raised in the second paragraph of your letter is answered in the last sentence of this same section which reads as follows:

"A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

Concerning the second section of the Revised Statutes quoted in your letter, that is, Section 10460 Revised Statutes of the State of Missouri, which concerns itself with the levies and assessments to be voted upon by a majority of the voters who are taxpayers of the district voting thereon. The exact language and the portion of the statute which applies to your inquiry is as follows:

"If any district obtaining the minimum guarantee as provided for herein levies in excess of twenty cents on the one hundred

dollars assessed valuation for school purposes (teachers' wages and incidental expenses), without such levy in excess of twenty cents on the one hundred dollars assessed valuation for school purposes (teachers' wages and incidental expenses) be authorized by a majority of the voters who are taxpayers of the district voting thereon * * * * *

To continue the examination of the statutes concerning laws applicable to all classes of schools, we find the further provision at Section 10358 R. S. Missouri, 1939, which reads as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state to increase the annual rate of taxation for school purposes, or when any five resident taxpayers of such district shall petition such board, in writing, that they desire an increase on the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district within the maximum rates prescribed by the Constitution for such purposes, and shall submit to the voters of said school district who are taxpayers of such school district, at an election to be by such board called and held for that purpose, at the usual place of holding elections for members of such board, whether the rate of taxation be increased as proposed by said board, due notice having been given as required by section 10418; and if a majority of the voters who are taxpayers voting at such election on the proposition to increase levy shall vote in favor of such increase, the result of such vote, and the rate of taxation so voted in such district, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county * * * * *

On the question as to who is a taxpayer under the statutes quoted, your attention is invited to the following authorities, 61 Corpus Juris 170, paragraph 123 points out:

"Generally speaking every person who subjects himself or his property to the jurisdiction of the state comes within its taxing power, and every property owner holds his title subject to the sovereign's right of taxation. Liability to taxation is, however, based upon the individual's reciprocal enjoyment of the benefits of government, and persons who are clearly beyond reach of governmental benefits are likewise beyond the scope of the taxing power."

Upon an examination of the cases bearing upon the question of who is a qualified voter and who is a taxpayer, we turn to the following decision, State ex rel. Sutton v. Fasse, 88 S. W. 1, 189 Mo. 532. This case held that a school director must be a citizen of the United States, a resident taxpayer and qualified voter of the district, and must have paid a state and county tax within one year preceding his election. The decision further states that the statutes bearing on the subject above mentioned, and I quote, "Statutes bearing on this subject must not be so construed as to have unreasonable consequences."

This question is further discussed in State ex rel. Mitchell v. Heath, 345 Mo., 1. c. 230, and I quote:

"Section 9287, Revised Statutes 1929, provides that common school districts shall be governed by a board of three directors 'who shall be citizens of the United States, resident taxpayers of the district (21 years of age), and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding, his, her or their election.' The decisive question here is whether or not respondent, under the admitted facts, has

complied with the above italicized part of the section prescribing qualifications essential to his eligibility to the office of school director. (Sec. 9328, R. S. 1909, prescribes this same qualification for directors of City, Town and Consolidated schools; see also Secs. 9517 and 9572, R. S. 1929, for qualifications in larger cities where strangely this requirement is relaxed or abolished.) It should also be noted that substantially the same provision is made concerning qualifications of members of both houses of the General Assembly. (Const., Art. 4, Secs. 4 and 6). The evident purpose of this requirement is to have such officers, who impose taxes on others and determine how they shall be spent, chosen from among those citizens who have been paying, and will likely continue to pay, taxes. It is said, however, that such 'statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers.' (46 C. J. 937, sec. 32.) The Missouri decisions have given a liberal construction to this and similar sections prescribing requirements of eligibility to elective offices."

Further defining taxpayer we find in *Castilo v. State Highway*, 312 Mo. 244, 279 S. W. 673 the following definition:

"Taxpayer is defined as a person charged with tax, a person owning property in the state subject to tax and on which he regularly pays taxes."

Sustaining the above, we further quote *State ex rel. Barrett and Newman v. Clements*, 305 Mo. 297, 264 S. W. 984, and *State ex rel. Bellamy and Harris v. Menengali*, 270 S. W. 101, 307 Mo. 447.

The next matter for determination concerns the proposition whether a general statute covering the qualifications

of a voter will govern in the instance inquired into or should a special statute which provides additional qualifications for voters at the annual election for raising the school levy obtain? In answering this question as to whether the general or special statute is to prevail, the following decisions of the State are given for your consideration:

"Two statutes relating to same general subject matter should be read together and harmonized, if possible, with view to giving effect to consistent legislative policy; but, to extent that statute which deals with common subject matter in particular way will prevail over earlier statute of more general nature." State v. Mangiaracina, 125 S. W. (2d) 58, 344 Mo. 99.

"Two statutes relating to same subject must be read together, and provisions of one having special application to particular subject will be deemed a qualification of or 'exception' to other statute general in its terms." Eagleton v. Murphy, 156 S. W. (2d) 683, 138 A. L. R. 749.

"Statutes in pari materia should be read and construed together in order to keep all provisions of law on same subject in harmony, so as to work out and accomplish Legislature's central idea and intent." State ex rel. Lefholz v. McCracken, 95 S. W. (2d) 1239, 231 Mo. App. 870.

CONCLUSION

The conclusion at which we arrive in the light of your inquiry and the authorities quoted above is as follows:

That in providing for the qualifications for voters who may vote on annual levies and assessments under Section 10460, Revised Statutes of the State of Missouri, require, first, that any person twenty-one years or over residing in the State more than one year and in the county, city or town sixty days, and in the district thirty days, AND IN ADDITION,

Mr. Glen Simpson, Superintendent

-7-

March 29, 1943.

taxpayer of the district, may vote at the annual election to raise the said levy.

That the special statute, Section 10460 Revised Statutes of the State of Missouri will take precedence over and above the general statute, Section 11469 Revised Statutes of Missouri, 1939, and Section 10420 Revised Statutes of the State of Missouri.

Further that the qualifications to raise the levy at the annual election for voters requires the voter to be a taxpayer. The two general statutes in which persons may vote require age and residence as a qualification for voters who wish to vote for state and county officers and for school directors, and it would seem that the higher qualifications for voters at the annual election to raise the levy is entirely consistent with the statutes and authorities quoted above.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LIM:jn

CRIMINAL COSTS: Upon felony conviction State should not
pay defendant's witness fees.

June 2, 1943

Honorable William E. Shirley
Prosecuting Attorney
Adair County
Kirksville, Missouri



Dear Sir:

This is in reply to your letter of May 27, 1943, in which you request an opinion, as follows:

"In a case in which a man is charged with a felony, tried and convicted is the State liable for the costs made by the defendant?"

Section 4220 R. S. Missouri, 1939, reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Under this section, when a person is convicted of any felony, or misdemeanor, he must pay the cost and neither the State nor county is compelled to pay the costs incurred on his part, except fees for board. Also, under this section, witnesses subpoenaed by the defendant must look to him to receive their witness' fees, where the defendant has been convicted either of a felony or misdemeanor. The rule is different where a defendant has been acquitted on a charge where the punishment is capital punishment, or confinement solely in the Penitentiary.

Section 4239 R. S. Missouri, 1939, reads as follows:

June 2, 1943

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

This section provides for the certification to the state auditor for the payment of the fee bill, and the judge and prosecuting attorney shall certify that the defendant is insolvent and further provides, "and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

Section 4221 R. S. Missouri, 1939, reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the

June 2, 1943

county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Under the above section, where the defendant has been convicted in a capital case, or has been sentenced to imprisonment in the Penitentiary, or in cases where such person is convicted, punishable solely by imprisonment in the Penitentiary, but has been confined elsewhere on account of his age, the State must pay the costs, except costs incurred by the defendant where the defendant is insolvent. Also under this section the State is not required to pay witness fees to defense witnesses. Witnesses for the defendant must look to the defendant for their fees. A continuance at the request of the defendant is a judgment against the defendant and should not be contained in the fee bills. It was so held in *State of Missouri, Respondent v. S. G. Barker*, 63 Mo. App. 535.

The entire subject of costs in both civil and criminal cases is a matter of statutory enactment, and, as such statutes must be strictly construed, the officer, or other person claiming costs which are contested must point out the statute authorizing their taxation. (*Ring v. Charles Vogel Paint & Glass Co.*, 46 Mo. App. 374; *State ex rel. Clarke v. Wilder*, 94 S. W. 499, 197 Mo. 27.) Sections

Honorable William E. Shirley (4)

June 2, 1943

4220 and 4221, supra, specifically forbid the State to pay costs accrued on behalf of the defendant.

CONCLUSION

It is, therefore, the opinion of this department, that where a defendant has been convicted on a felony he should be adjudged to pay the costs, but, if the defendant shall be unable to pay costs, then the State should pay the costs, except costs incurred on behalf of the defendant.

It is further the opinion of this department, that in no event, in case of a conviction of a defendant on a felony, should the State pay the fees of defendant's witnesses, or the costs of continuances granted at the request of the defendant.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED BY:

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

COMMISSIONER OF HEALTH: Not entitled to \$10 per day as secretary, nor \$10.00 per day as member of board in addition to his annual compensation of \$5,000.00.

March 1, 1943

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This is to acknowledge your letter of recent date, in which you request an opinion from this department. Your letter reads as follows:

"Dr. James Stewart who is Secretary of the State Board of Health and receives a monthly compensation as Secretary, was recently appointed as a member of the State Board of Health by Governor Donnell and confirmed for this appointment by the Senate in Special Session.

"Last week the State Board of Health met and Dr. Stewart has submitted a bill for \$10.00 per diem for attending this meeting.

"In the past, the Secretary of the Board has always attended the meetings of the State Board, but since he is on a salary as Secretary, has never presented a bill for per diem.

"I would like an opinion from your office as to whether Dr. Stewart as both Secretary of the State Board of Health and a member of the State Board of Health would be entitled to his monthly salary as Secretary and at the same time his 'per diem' as a member of the Board of Health in attending the monthly meetings of the Board."

Your question pertains to the office of Secretary of the State Board of Health and you state that Dr. James

Stewart receives a monthly compensation as such secretary. We assume, however, since the office of Secretary of the State Board of Health has been abolished by statute that you mean that he receives a salary as Commissioner of the State Board of Health. The Secretary of the State Board of Health was abolished by the General Assembly in the 1933 Session (Laws of Missouri 1933, p. 269). The section abolishing the office of secretary is Section 9744, R. S. Mo. 1939, and is as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this law, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

It will be noted by this section that the duties theretofore performed by the Secretary of the State Board of Health prior to the effective date of the amendment of 1933 are, under the statute, now assumed by the Commissioner of Health and, the Commissioner shall assume, in the language of the statute, "all

the rights, powers, privileges and duties heretofore conferred by law upon the secretary of the State Board of Health heretofore authorized by law" and, further, the section provides that the Commissioner of Health shall receive \$5,000.00 per annum.

In this state, therefore, we do not now have a statutory secretary of the State Board of Health, as known prior to the amendment of 1933, and all the duties are now performed by the Commissioner of Health. Since the office of secretary of the State Board of Health was abolished by law all compensation formerly received by the secretary of the State Board of Health "went out the window" with the office.

Your question is, as we understand it, "Does the secretary receive \$10.00 per day additional as secretary, for attending the meetings of the Board of Health?" The rule is stated briefly in 46 C. J. 1016, Sec. 234:

"Where an office is abolished, the incumbent has no further right to compensation."

(Citing: Orahood v. Denver, 41 Colo. 172, 91 P. 1116; Gilbert v. Paducah, 115 Ky. 160, 72 S. W. 816; Wittmer v. New York, 50 App. Div. 482, 64 NYS 170; Jones v. Shaw, 15 Tex. 577; Meissner v. Boyle, 20 Utah 316, 58 P. 110; Hall v. State, 39 Wis. 79.)

There is no provision in the statute for the \$10.00 per diem compensation for the Secretary of the State Board of Health for the very good reason that there is now no such office as Secretary of the State Board of Health.

The rule is stated in Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857, 1. c. 860, as follows:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is

confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

You further desire to know whether the Commissioner of Health is entitled to receive \$10.00 per day as a member of the State Board of Health, that is, the \$10.00 for each day engaged in the service on the Board, as allowed to each member of the Board of Health. We find no statute which authorizes or permits the Commissioner of Health to serve as Commissioner of Health and also be a member of the board and receive the \$10.00 per day as a member of such board. We do not think that the law contemplates that one person shall hold both the office of Commissioner of Health and receive the \$5,000.00 annual salary as such and be a member of the Board of Health and receive \$10.00 per day in addition thereto for such services, because under Section 9740 R. S. Mo. 1939, the Commissioner of Health "shall perform such duties as may be prescribed by the board and this article" (Article 1, Chapter 57, R. S. Mo. 1939) and he would be performing duties as Commissioner of Health prescribed by himself as a member of the board. The duties of one would be incompatible with the duties of the other.

CONCLUSION

It is, therefore, the opinion of this department that the Commissioner of Health is, under the law, entitled to

Hon. Forrest Smith

-5-

3-1-43

receive \$5,000.00 per annum as Commissioner of Health and is not entitled to receive \$10.00 per day for performing duties as secretary of the board, nor \$10.00 per day as a member of the Board of Health.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
ATTORNEY-GENERAL

CRH:CP

LIEUTENANT-
GOVERNOR :

Compensation of President and President pro tempore of Senate, authority for paying, amount of, how paid, out of what funds and whether such officers are included in 75 employees allowed Senate.

March 4, 1943.



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri.

Dear Sir:

We have your letters of February 23 and 25, 1943, presenting the following for our opinion:

- (1) Is an act of the General Assembly necessary in order for the Lieutenant-Governor to be paid compensation for presiding over the Senate?
- (2) What compensation is he to be paid for presiding over the Senate?
- (3) On what fund is he to be paid for presiding over the Senate?
- (4) How are the President and President pro tempore of the Senate to be paid for presiding over the Senate?
- (5) Are the President and President pro tempore of the Senate included in the Constitutional limit of seventy-five employees of the Senate?

We shall take up the questions in the above order.

In State ex rel. Bradshaw v. Hackmann 276 Mo. 600, the State Warehouse Commissioner had incurred traveling expenses in making trips outside the State of Missouri. The auditor refused to issue a warrant in payment of such expense. Bradshaw sued to compel issuance of said warrant. The appropriation act against which Bradshaw contended the expense was chargeable appropriated a sum of money for "traveling expenses" as well as other enumerated purposes. In deciding the question, the court said, l. c. 607:

"We approach the examination of the question whether the State is liable to pay the relator's account for traveling expenses incurred by him in going to and returning from

Washington, D. C., with the axiom, several times ruled by us to be fundamental, 'that no officer in this State can pay out the money of the State, except pursuant to statutory authority authorizing and warranting such payment.' (State ex rel. Bybee v. Hackmann, 276 Mo. 110; Lamar Twp. v. Lamar, 261 Mo. 171.) The only exception to this rule (and it is not in fact an exception) is 'that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties effectual, is conferred by implication.' (State ex rel. Bybee v. Hackmann, supra.) Under this rule we perforce must look to the statutes which created the office of Warehouse Commissioner and which prescribe his duties for authority to make our writ peremptory. It we find no such authority, either express, or which arises from such necessary implication as is above defined, it is manifest that we are without power to compel respondent to audit relator's expense account, for expenses incurred by him in going to and returning from Washington. * * * * *

After making these observations, the court proceeded to demonstrate how the Warehouse Commissioner's act did not authorize the commissioner to travel without the state and held that such expense could not be paid because there was no authority to incur such expense.

In State ex rel. Bybee v. Hackmann, 276 Mo. 110, it was contended that the auditor was under no duty to pay an account for stenographic services rendered the State Board of Equalization, because no authority existed for hiring such stenographer. In ruling the point the court said, l. c. 116:

"That question simply stated is this: Has the State Board of Equalization authority under the law to employ a stenographer at the expense of the State? If such Board of Equalization (hereinafter for brevity, called

simply the board) has any such authority; this authority must be bottomed on some statute. For it is fundamental that no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment. * * * * *

Then the court examined the statutes and determined that the board had authority to employ a stenographer and held the account proper..

As we understand these holdings, they rule that before an appropriation of funds for a particular purpose may be expended there must also be authority granted to the persons or body drawing on the appropriation to incur the obligation that is sought to be paid.

Applying this rule, it appears that Section 18 Article V of the Constitution provides:

"The Lieutenant-Governor or the President pro tempore of the Senate, while presiding in the Senate, shall receive the same compensation as shall be allowed to the Speaker of the House of Representatives."

Therefore, we must look to the provisions concerning the pay allowed the Speaker of the House to determine whether there is authority to incur this obligation. We find there is in Section 12891 R. S. Mo. 1939 which provides:

"The speaker of the house of representatives as such, shall, in addition to his per diem as a member, receive as his compensation for every day he shall actually preside, the sum of two dollars, to be audited and paid as other expenses of the general assembly." (Underscoring ours)

Due to the enactment of what is now Section 16 Article IV of the Constitution (Laws 1941 p. 718) fixing the compensation of members of the General Assembly at \$125.00 per month, that part of the

statute above underlined is now incorrect in speaking of "per diem" and is repealed by implication. However, that does not affect the balance of the statute and it is still operative to fix the compensation of the Speaker at two dollars (\$2.00) per day for being Speaker of the House.

It therefore appears that Section 18, Article V of the Constitution, aided by Section 12891 R. S. Mo. 1939, constitutes authority to incur the obligation for the compensation of the President and President pro tempore of the Senate while presiding over the Senate and therefore an appropriation for that purpose may be drawn upon to pay said obligation without any additional legislation.

The foregoing resume also supplies the answer to your second question. The compensation of the President or President pro tempore of the Senate for presiding over the Senate is two dollars (\$2.00) for each day either shall preside. Section 12856 R.S. Mo. 1939 provides in part that "The members of the general assembly and the president of the senate of this state shall receive, as compensation for their services, the sum of five dollars per day for each and every day they may serve as such, * * *," but since said provision, in so far as it relates to pay of members has been repealed by the new Section 16, Article IV of the Constitution, and in so far as it relates to pay of the President of the Senate, is in conflict with Section 18, Article V of the Constitution, we shall disregard it, leaving our conclusion as to the compensation of the President and President pro tempore resting on Section 18 of Article V of the Constitution, as aided by Section 12891, supra.

Relative to your third question, it appears that Section 12891, supra, which due to Section 18, Article V of the Constitution, applies to the President and President pro tempore of the Senate, provides that the compensation of such officers is "to be audited and paid as other expenses of the general assembly." Section 12870 R.S. Mo. 1939, then provides:

"When any * * officer * * of either house shall present his account for his compensation, and the same shall have been allowed, according to the rules of the house to which he belongs, a certificate thereof shall be granted, specifying the amount and on what account, and directing that the same be paid out of ap-

appropriations made for the pay of the general assembly; which certificate, in the case of a * * * officer of the senate, shall be signed by the president and attested by the secretary; * * * and upon presentation of such certificate to the state auditor, he shall draw his warrant on the treasurer for the amount."

This statute directs that the President and President pro tempore of the Senate be paid out of "appropriations made for the pay of the general assembly" and thus fixes the fund out of which they are to be paid.

The foregoing statute also supplies the answer to the fourth question, in that, said officer, in order to be paid, must present his account, have it allowed according to the rules of the Senate, obtain a certificate, signed by the President and attested by the secretary specifying the amount and on what account and directing that the account be paid out of appropriations made for the pay of the general assembly. Upon presentation of said certificate, the auditor may then draw his warrant in payment of the account.

Your fifth question involves Section 16a, Article IV of the Constitution which provides:

"Neither house of the General Assembly shall employ to exceed in all 75 employees, elective, appointive, or any other, at any time during any session."

We are of the opinion that the President and President pro tempore of the Senate are not to be included in computing the number of employees allowed the Senate. Our reason for this is very simple. They are not employees of the Senate - they are officers and the above provision only applies to employees. That that is true is to be seen by the fact that the Constitution states, "Neither house * * * shall" do what?, and the "what" is "employ." Then when the number is fixed at seventy-five, they are described as "employees." The further description of "elective, appointive, or any other," operates only to prevent evasion of the ban by change

March 4, 1943

in the method of selection. It does not broaden the term "employees." We had occasion to extensively consider the distinction between an "officer" and an "employee" in an opinion to the Honorable Lloyd C. Stark, under date of November 8, 1937, as follows (we copy without the use of additional quotation marks):

As chief Justice Marshall in *United States v. Maurice*, 2 Brock 103, points out "although an office is an employment, not every employment is an office." The question as to the distinction between a public officer and a public employee has been a matter of much litigation in the State of Missouri. Judge Leedy said in *State ex rel. Pickett v. Truman*, 64 S. W. (2d) 105:

"It is perfectly apparent that 'employment' and 'agency' are distinguishable from public office; but the line of demarcation between them is sometimes difficult of perception."

The Supreme Court of Kentucky in *Lexington v. Thompson*, 250 Ky. 96, stated:

"It is difficult to frame an answer to the question 'what is the difference' so as clearly to indicate the line separating the two."

Therefore, a general rule to take care of every situation cannot be laid down, because as Judge Lamm said in *Gracey v. St. Louis*, 213 Mo. 384, "danger lurks in mere generalizations, one sensible method of determining what is an office is to go to the written law creating the position and determining its duties * * *."

However, the courts of Missouri have in the numerous cases defined what constitutes a public office. The definition is as follows:

"A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

This definition was approved in State ex rel. Pickett v. Truman 64 S. W. (2d) 105; State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332; State ex rel. v. Hackmann, 300 Mo. 59; and Hasting v. Jasper County, 314 Mo. 144. To the same effect is the terse statement in State ex rel. Walker v. Bus, 135 Mo. 325 - "an officer receives his authority from the law and discharges some of the functions of the government."

The general distinction and most important indication is whether "the individual is invested with some portion of the sovereign functions of government." Mechem on Public Officers, para. 4, states:

"The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involve a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit."

The term "sovereignty of the state" is defined in State ex rel. Pickett v. Truman, supra, as follows:

"If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state. If he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state."

The Supreme Court of Missouri in the Truman case, *supra*, laid down certain criteria that would indicate a person is a public officer when - -

- (1) "the giving of a bond for faithful performance of the service required,
- (2) definite duties imposed by law involving the exercise of some portion of the sovereign power,
- (3) continuing and permanent nature of the duties enjoined, and
- (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive."

Other denotations are given in *Gracey v. St. Louis*, 213 Mo. 384, as follows:

"His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. *State ex rel v. May, supra; Throop v. Langdon*, 40 Mich. 682. And the general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers as well as that of duty. 6 Words and Phrases, p. 4923."

It will be noted that the courts recognize their inability to lay down the precise distinction between public officers and public employees and have rested their decisions upon the statement of facts presented therein. It may be well to note instances in Missouri in which the courts have classified certain persons as public officers and those which they have held mere employees. Those who have been held officers are: a member of the Board of Water Commissioners for the City of St. Louis, *State ex rel Wingate v. Valle*, 41 Mo. 29; the superintendent of streets of Kansas City, *State ex rel. Cannon v. May*, 106 Mo. 488, 17 S. W. 660; a

March 4, 1943

deputy sheriff, State ex rel Walker v. Bus, 135 Mo. 325; 36 S. W. 636; the superintendent of water works of Kansas City, State ex rel Cameron v. Shannon, 133 Mo. 139; the chief grain inspector appointed by the Board of Warehouse Commissioners, State ex rel Tedford v. Know, 105 S. W. 1040; a deputy elevator inspector of the City of St. Louis, Gracie v. St. Louis, 213 Mo. 384, 111 S. W. 1159; the treasurer of a school district, State ex rel school district v. Harter, 118 Mo. 516; and notaries public, Wilson v. Kimmel, 109 Mo. 260, 19 S. W. 24. Those held to be employees are: the chief engineer of the city hall, State ex rel Hall v. Gray, 91 Mo. App. 438 and a delinquent tax attorney, State ex rel. Pickett v. Truman, 64 S. W. (2d) 105. * * * * * The distinction between a public officer and public employee cannot absolutely be defined. The most important characteristic which distinguishes an office from an employment is the delegation and possession of sovereign power. Other indicia are: (1) tenure and permanency of duties; (2) definite duties imposed by law; (3) taking of oath and giving of bond; (4) compensation; (5) liability for misfeasance or non-feasance; although no one of the above is conclusive in every case.

We think the foregoing, as taken from our previous opinion, furnishes authority for our statement that we do not think the President and President pro tempore of the Senate are to be included in computing the seventy-five employees allowed to the Senate. The President and President pro tempore of the Senate have all the functions, powers and duties, except the bond, that are usually used in judging whether a particular position is an office or employment.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKittrick
Attorney General

LLB:AU

COUNTY TREASURER: County is liable for premium on surety
OFFICERS: bond where the officer elects to give
BONDS: surety bond and county court consents
thereto.

March 9, 1943



Mr. J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date, in which you request the opinion of this department. Your letter of request is as follows:

At the general election in 1938 Esley S. Trantham was elected county treasurer of this county. Shortly thereafter he had a conference with the county court in regard to the kind of bond he should file. The salary of the county treasurer prior to that time had been \$125.00 per month. The county court in December, 1938 made an order that his salary should be \$150.00 per month providing he would file a surety bond and pay the cost of same himself out of his increased salary. The cost of the bond was \$25.00 per month.

"Mr. Trantham did file surety bond which was accepted and approved by the court. After January 1, 1939, a new county court went into office and during January of that year the new court made an order rescinding the order of the former court and reduced Trantham's salary back to \$125.00 per month and refused to pay the premiums on his bond. He included the amount of his premiums each year in his

annual budget which was by the court disallowed. Trantham is now contending that the county is liable under section 3238 R. S. 1939 for the premiums on the bond, which Mr. Trantham has already paid.

"Will you please let me have your opinion as to whether or not Webster County, under the above circumstances, is liable for the repayment of the premiums to Mr. Trantham."

Your question is whether or not Webster County, under the statement of facts set forth in your letter, is liable for the payment of the premium of the surety bond to secure the faithful performance of the duties of the office of county treasurer, which premium amounted to \$25.00 per month, or, \$300 per year.

Under Section 13795, R. S. Mo. 1939, which was repealed and re-enacted by the 1937 Session of the General Assembly, and found in Laws of Missouri 1937, page 426, it is provided, R. S. Mo. 1939, as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

At the 1937 Session of the General Assembly, what is now Section 3238, R. S. Mo. 1939, was passed (Laws of Missouri 1937, page 190) and provides in part as follows:

"Whenever * * * any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer * * * shall be required by law of this State, or by charter, ordinance or resolution, or

by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such * * * county * * * to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri, and the cost of every such surety bond shall be paid by the public body protected thereby."

It will be noted that under the provisions of Section 13795, supra, the person elected or appointed county treasurer shall, within ten days after his election or appointment, enter into a bond to the county in a sum of not less than \$20,000 with such sureties, resident landholders of the county, as shall be approved by the county court for the faithful performance of his duties. However, by Section 3238, supra, which was enacted at the same Session of the Legislature, it is provided that the county treasurer may, with the consent and approval of the governing body, which in this instance means the county court, elect to enter into a surety company bond. If the officer elects to give a surety company bond and the county court consents to the giving of such bond the county court is liable for the payment of such bond.

This construction was given this section by the Supreme Court of this state in the case of Motley v. Callaway County, 149 S. W. (2d) 875, at l. c. 877, wherein the court said:

"* * * The Legislature, no doubt taking notice of the results of some of these during recent depression periods, considered that surety company bonds could give better protection to public funds in the custody of public officers. It, therefore, authorized such a bond for county officers if the officer elected to furnish it and the county court approved it. It also recognized that to require an officer to pay the premiums therefor would have the effect of reducing his actual net compensation. *
* * * * *"

Under the statement of facts given in your letter, if the County Court made an order in December 1938, directing that the County treasurer's salary be \$150.00 per month, provided he would file a surety bond and pay the cost of same himself out of his increased salary, and if the County Court consented to this order and approved same, the County would be liable for the payment of the surety bond of \$300 per year, namely, \$25.00 per month, indicated in the amount of the increased salary.

You state that after the first day of January, 1939, a new County Court went into office and rescinded the action of the old County Court and reduced the County treasurer's salary to \$125.00 per month and refused to pay the premium on the bond. The action of the old County Court by its written record, under the circumstances, in our opinion, could not be rescinded or changed by the new County Court.

In the case of *Aslin v. Stoddard County*, 106 S. W. (2d) 472, 1. c. 476, the court said:

"We regard said case of *Manley v. Scott* as in point and as being soundly reasoned. The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs. To illustrate:

"In *Walker v. Linn County*, 72 Mo. 650, the county court, through an appointed agent,

insured county property for a period of five years. Point was made, on demurrer, that the court had no power to make the contract. This court held that the county court, under its statutory authority to 'have the control and management' of the county's property and its statutory duty to 'take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage,' had the implied authority to insure the buildings belonging to the county. The contract was held valid. * * * * *

We think that the above statement of law in the Aslin case is applicable to the facts as set forth in your letter, and if, in this instance, the County treasurer, Mr. Trantham, elected to give a surety bond with the consent and approval of the County Court of such county and same was made a matter of record by the Court, that same could not be rescinded immediately thereafter by the new County Court.

CONCLUSION

It is, therefore, our opinion that under the statement of facts as given in your letter of request, and the order, as we understand it, having been made a matter of record by the old County Court, the County is liable for the payment of the \$300 surety bond given by the County treasurer for the year, even though it was paid to the County treasurer in the form of salary, for the purpose of paying the premium on the bond.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

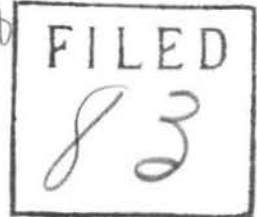
ROY McKITTRICK
Attorney-General

CRH:CP

MOTOR VEHICLES: Student operator need not obtain
chauffeur's license.

March 11, 1943

Honorable Claude O. Smith
Assistant Prosecuting Attorney
Jackson County
Kansas City, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of March 10, 1943, which reads as follows:

"On February 18th, 1943 Trooper James F. Judkins of the State Highway Patrol arrested Elmer E. Pease, 4310 Woodland St., Kansas City, Missouri while operating a bus owned by the Kansas City Public Service Co., at or near 79th and Ward Parkway in Washington Township, Jackson County, Missouri, for not having a chauffeur's license. At the time Pease was arrested he was operating said bus as a student operator under the supervision of Henry E. Backstrom, 4504 Fairmount St., Kansas City, Missouri, who is an experienced chauffeur and who has a chauffeur's license. The owner of the bus claims Backstrom was in charge of the bus; and that they had to determine if Pease was a competent driver before he could fill out an application and request a chauffeur's license and operate their bus. At the time of the arrest Pease had a Kansas City, Missouri driver's license #165533 issued to him February 28th, 1941 and a Missouri State Driver's license # R-1197334 issued to him March 19th, 1941.

Honorable Claude O. Smith

(2)

March 11, 1943

"Will you kindly furnish this office your opinion regarding whether the statutory law of this State is to be construed to require a student operator under the facts as above stated to have a chauffeur's license."

In reading the facts set out in the above request, it first appears that the operator, Elmer E. Pease, should have obtained a chauffeur's license, for the reason that under an opinion rendered by this office, on September 22, 1939, to the Honorable James P. Finnegan, Prosecuting Attorney of the City of St. Louis, Municipal Courts Building, we held that it was an offense against the laws of this State to operate a commercial motor vehicle as a chauffeur without first obtaining a chauffeur's license. We are enclosing a copy of this opinion.

Under the facts set out in your request, the operator, Elmer E. Pease, was not regularly employed as a chauffeur for the Kansas City Public Service Company, but was merely a student and acting in a temporary capacity. Under a similar state of facts, the Supreme Court of this State, in the case of Friedman v. Maryland Casualty Company, 71 S. W. (2d) 491, held that where a grocer's employee customarily operated a delivery truck during the regular driver's absence he was not a chauffeur, and not required to be a registered vehicle operator within the Motor Vehicle Act. Under the facts in the case a boy between the age of sixteen and eighteen merely operated the delivery truck during the regular driver's absence. In your case the Public Service bus was under the control of Henry E. Backstrom, who was supervising the student. The student being not regularly employed as a chauffeur came within the holding of the above case. In that case, the court, at page 496, said:

"At the time of the collision, July, 1925, the Missouri Motor Vehicle Statute (Laws of Missouri, 1st Extra

Session, 1921, pp. 76 to 107, inclusive) was in force (now constituting chapter 41, vol. 2, R. S. Mo. 1929 (section 7758 et seq.), with such amendments as have been made (Mo. St. Ann. Sec. 7758 et seq., p. 5178)). A consideration of the entire Motor Vehicle Act will disclose (it seems to the author hereof) that three kinds of 'operators' of a motor vehicle are contemplated by the statute, first, a 'Chauffeur,' 'An Operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire' (section 3, Laws 1st Extra Session 1921, p. 77); second, a mere 'operator' defined as 'any person who operates or drives a motor vehicle.' See aforesaid Session Acts, Sec. 3, pp. 77, 78. Lower down on said page 78 a definition is given of a 'Registered operator' as 'an operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle.' Section 8 of said Session Acts, p. 83, has to do with the registration of every person who desires to operate a motor vehicle as a chauffeur, etc.; and the person so desiring to operate as a registered chauffeur, upon complying with paragraphs (a) and (b) of said section 8, shall, under paragraph (c) receive a metal badge bearing the words 'Registered Chauffeur,' etc., but 'no certificate of registration as chauffeur shall be issued to any person under the age of eighteen years.' Section 9 of said Session Acts, p. 83, provides for the

registration of every person who desires to operate a motor vehicle as a registered operator, and who complies with the provisions thereof shall receive a 'certificate of registration,' but no certificate 'as a registered operator shall be issued to any person under the age of eighteen years.'

"Other sections, for example, sections 12, 15, paragraph (h) of section 29 (pages 84, 86, 105), and perhaps others, have provisions relating respectively to 'Chauffeurs,' 'Registered Operators,' and 'Operators.' So that it is manifest that they are each in a separate and distinct class with different regulations concerning each class, and the only regulation or limitation as to age as to those who are merely 'operators' is that they must not be under 16 years of age. Paragraph (i) of section 27 of said Session Acts, pp. 103, 104. The only alleged violation of law charged against the driver of plaintiff's truck at the time of the collision is that he was under the age of eighteen years, it being conceded that he was over sixteen. But there is no provision in the Motor Vehicle Statute requiring the driver of said truck, under the circumstances shown in this case, to be a registered operator and hence to be eighteen years of age. * * * * *"

CONCLUSION

It is, therefore, the opinion of this department, that a student operator under the supervision of an operator who has a chauffeur's license for the operation of a bus

Honorable Claude O. Smith

(5)

March 11, 1943

belonging to the Kansas City Public Service Company need not first obtain a chauffeur's license while under temporary training.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

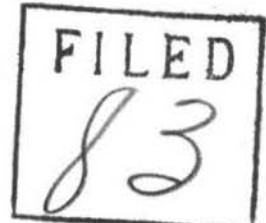
WJB:RW
ENC (1)

WITNESS: Witness in criminal case once subpoenaed shall
attend case until discharged. In change of
AND FEES: venue witness need not be resubpoenaed.

May 6, 1943

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

5/6



Dear Sir:

This will acknowledge receipt of your letter of April 12, 1943, in which you request our opinion regarding subpoenas for witnesses in criminal cases. Your letter is set out in full, as follows:

"We request your official opinion in regard to subpoenas for witnesses in criminal cases.

"1. If a witness has been once subpoenaed to appear before a court, is it necessary for the court to make an order requiring such witness to appear from time to time and term to term thereafter without further subpoena, and if such witness shall appear without such order of court is such witness entitled to his fees.

"2. If a witness has been once subpoenaed to appear before a court in a certain county and a change of venue is taken to another county, does such witness have to be resubpoenaed, where no recognizance has been taken.

"3. If a witness has been once subpoenaed to appear before a court in a certain county and a change of venue is taken to another county is it necessary for the

May 6, 1943

court to make an order requiring such witness to appear in the court to which the change of venue is taken, and if he does so appear without such court order, is the witness entitled to his fees.

"The questions set forth in this request have arisen in auditing cost bills and other auditing procedure and, as above stated, refer to criminal cases. We request your official opinion on the various points listed."

At the outset we are assuming that no question is involved with respect to the subpoena itself. We assume that in all the questions propounded the proper service was had and correct returns were made by the officers, and the only matters involved are whether your office may tax as costs in criminal cases the fees for witnesses in attendance upon criminal trials in the situations set out in your three questions.

A witness must be regularly subpoenaed before he is entitled to his fee. This result is reached in the case of *Lucas v. Brown*, 127 Mo. App. 645, 106 S. W. 1089. We do not set out this decision in full as it is quoted elsewhere in this opinion. The chapter in our Revised Statutes devoted to criminal costs, and concerning itself with the matter of witnesses, would seem to require that a witness in a criminal case attend the case until he is discharged. We refer your attention to Section 4234, R. S. Mo. 1939, which is as follows:

"Whenever a witness in a criminal case has been once subpoenaed or recognized to appear before any court or magistrate, he shall attend under the same as such witness, from time to time, and from term to term, until the case be disposed of, or he be finally discharged by the court or justice; and he shall be liable to attachment for any default or failure

to appear as such witness, and adjudged to pay the costs and such fine as the court may properly impose; and no costs shall be allowed for any subsequent recognizance or subpoena for any such witness."

We also, on this situation, which requires that a witness once subpoenaed to attend in a criminal case shall attend the case until it has been disposed of, call your attention to the decision in *State v. Wright*, 76 S. W. (2d) 459, 1. c. 461, 336 Mo. 135, 1. c. 139:

"The gist of the resistance of the state at the trial to the continuance seemed to be that Mrs. Wright was subpoenaed to appear on a day on which the case was not on the docket for trial. The record proper does not support this contention of the state. Nor should Mrs. Wright have been subpoenaed anew for October 3, the day on which the case finally went to trial after days given to the disposition of a motion for severance, motions to suppress evidence; a demurrer to the information, amendments of the information, and the like. She having been duly subpoenaed at her home in Excelsior Springs to appear, on September 22, at Carrollton, the county seat of Carroll county, she became subject to section 3839, R. S. Mo. 1929 (Mo. St. Ann., Sec. 3839, p. 3337), which provides: 'Whenever a witness in a criminal case has been once subpoenaed or recognized to appear before any court or magistrate, he shall attend under the same as such witness, from time to time, and from term to term, until the case be disposed of, or he be finally discharged by the court or justice.'"

Now, devoting ourselves to continuances, we find that when a criminal case has been continued the statutes provide the following with respect to the witnesses, as set out in Section 4045, R. S. Mo. 1939:

"Whenever a criminal case shall be continued, all the witnesses in attendance shall be called by the court, and as many of them as the parties may desire shall be required to enter into recognizance for their appearance on the day of the next term on which such case shall be set for trial, which day shall be fixed and designated by the court at the time the continuance is granted; and if any such witness shall fail to appear in said court when so called, for the purpose of being recognized, such witness shall forfeit all his fees as witness in such cause, and may be compelled to appear by attachment."

You will note under this section that they shall be called by the court and as many as the parties may desire shall be required to enter into a recognizance for appearance. Now, if any witness fails to appear when so called for the purpose of being put under a recognizance, such witness shall forfeit all his fees. That portion of the statute requiring that they shall be called is mandatory and the word "may" is discretionary and we may have a situation where a witness has not entered into a recognizance yet he is still liable for an attachment against him if he does not appear for trial.

Directing our attention to those statutes providing for fees, their payment and the disposition of the same we find in Sections 13420 and 13421, R. S. Mo. 1939, all of the provisions upon this question. We do not set out these sections because of their length, but cite them for your convenience.

Now, looking to an answer to the question as to when a witness attends "under subpoena" we find, in the decision of

Wilson v. The St. Louis, K. and N. W. Ry. Co., 53 Mo. App. 342, 1. c. 344, the following:

"The question involves the construction of the statute pertaining to the fees of witnesses. That portion of section 5003, Revised Statutes of 1889, which is pertinent, reads: 'Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice, as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognition, and the number of miles necessarily traveled.'

"The question is, did the witnesses attend the trial in obedience to a subpoena? If so, they are entitled to mileage. While the statute does not provide for acceptance of service of a subpoena, we know of no good reason why a witness could not dispense with the legal forms of service. In Pennsylvania it was expressly decided that he could. Feree v. Strome, 1 Yeater (Pa.) 303. A subpoena is not directed to an officer, but to the witness himself.

"In the case of Herson v. Railroad, 18 Mo. App. 439, subpoenas were not issued. The witnesses attended the trial at the request of the defendant. The Kansas City Court of Appeals held, and we think properly, that the attendance of the witnesses in that case was purely voluntary, and that they were not entitled to claim mileage. But this cannot be said of witnesses who have accepted service of subpoenas. Attendance by them should be regarded as in obedience to or 'under subpoena.' And we think this is true, although the witnesses live more than forty miles from the place of trial, and the legal

fees have not been tendered or paid.
The right to have fees paid in advance may also be waived."

Referring again to Section 13421, R. S. Mo. 1939, previously cited but not set out, which provides that a witness, upon application for allowance of fees, shall be put under oath by the clerk as to the truth of the facts contained in the entry on the clerk's records, we find a decision sustaining the proposition that before a clerk can tax per diem and mileage of a witness the latter must make oath to the truth of the record entry. See *Veidt v. Railway Co.*, 109 Mo. App. 102, 1. c. 103 for the following quotation:

"The question thus arising is, whether or not the fees of the witness so allowed were taxable against the defendant as costs in the case. At common law no recovery of costs was allowable, and when statutes were passed authorizing their allowance they--the statutes--were always strictly construed. *State ex rel. v. Seibert*, 130 Mo. 1. c. 213, and cases there cited. And this rule of statutory construction obtains in this State. *Steele v. Wear*, 54 Mo. 531; *Shed v. Railroad*, 67 Mo. 687; *Sinclair v. Railroad*, 74 Mo. App. 500; *Houts v. McCluney*, 102 Mo. 13; *Thompson v. Elevator Co.*, 77 Mo. 520; *St. Louis v. Meintz*, 107 Mo. 611; *Hoover v. Railroad*, 115 Mo. 77; *State ex rel. v. Oliver*, 116 Mo. 188; *State ex rel. v. Seibert*, 130 Mo. 202.

"Applying this rule to the case before us, and we must conclude that as the witnesses were not first sworn to the truth of the fee-book entry by the clerk, he was neither authorized to allow the fees for which they applied, nor to tax the amount thereof as costs in the case. The judgment of the court denying the defendant's motion cannot be upheld."

Looking now to Lucas v. Brown, 127 Mo. App. 645, 1. c. 651, the court said:

"It would seem too plain for serious discussion that in order for the fees and mileage of a witness and the fees of the clerk and sheriff for issuing and serving a subpoena to be legally taxed as costs in the case, it must be made to appear that the attendance of the witness was compulsory and not voluntary and that the provisions of sections 3259 and 3260 of the statutes above quoted have been satisfied. The only method for compelling the attendance of the witness is that provided in section 4661, Revised Statutes 1899. 'In all cases where witnesses are required to attend the trial in any cause in any court of record, the summons shall be issued by the clerk of the court wherein the matter is pending, or by some notary public, or justice of the peace of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear.' The section following requires that the summons, or subpoena as it is called, 'shall contain the names of all witnesses for whom a summons is required by the same party, in the same cause, at the same time, who reside in the same county, and may be served in any county in the State.' The manner in which the subpoena may be served is prescribed in section 4671: 'Subpoenas shall be directed to the person to be summoned to testify and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person who would be a competent witness in the cause, and the sheriff, coroner, mar-

shall or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held.'

The statutory provisions having to do with subpoenas are cited at this point for convenience only. They may be found at Sections 1897, 1898 and 1908, R. S. Mo. 1939, and, under this latter section we find authority for the proposition that where a subpoena was not lawfully issued a witness is entitled to his per diem fee only. This may be found in a decision of the Kansas City Court of Appeals in Knight v. Donnelly, 135 Mo. App. 105, l. c. 107, as follows:

"As no instructions were asked or given, strictly speaking, there is nothing before the court to review. On the merits of the case, it may be said however, that the action of the court should be approved. The attendance of the witness was purely voluntary. 'A subpoena is a process of court and must be issued in the manner prescribed by the statute. It must contain the names of the witnesses to whom it is directed and be signed by the clerk and attested by the seal of his office.' (Lucas v. Brown, 127 Mo. App. 645.) The so-called subpoena was not such because it was not signed by the clerk or one of his deputies, which is an absolute requirement of the statute; therefore, the witness' attendance was voluntary and she was entitled to a fee only for attendance while testifying. Affirmed. All concur."

We do find in the statutes, at Sections 4229 and 4230, R. S. Mo. 1939, certain provisions requiring the endorsement of names on the indictment or information and the further provision that the circuit judge and prosecuting attorney shall certify on the fee bill the names of witnesses entitled

to fees and mileage.

Taking up the situation where a cause is removed from one county to another, we look to the statutes for the provisions in these situations and we find authority for the statement that witnesses shall attend the trial in cases of removal from the original county, at Section 4032, R. S. Mo. 1939, which reads as follows:

"The defendant and all witnesses and others who shall have entered into any recognizance to attend the trial of such cause, having notice of the removal thereof, shall be bound to attend at the time and place of trial, in the county to which the cause is removed, and a failure to do so shall be deemed a breach of recognizance."

We are now concerned with the provisions as to the kind and character of notice to witnesses in the event of an order of removal of a cause. It would seem that the order of removal is all the notice the witness is entitled to receive, according to our statutes. This is covered in Section 4063, R. S. Mo. 1939, as follows:

"When the order of removal is made in term, it shall be deemed a notice to every person who shall have entered into a recognizance to appear at such term; in other cases the notice shall be in writing, signed by the prosecuting attorney or clerk of the court, and served on the person so recognized, in the manner provided by law for serving notices."

We have further noted that under Section 4234, R. S. Mo. 1939, a witness shall attend the case until discharged. We

May 6, 1943

cite this section but do not quote it because it has been written in detail above. Section 4023, R. S. Mo. 1939, prescribes in detail how the order for removal is to be entered, and we have already noted that a change of venue cannot be made until such order has complied with this section and, further, we have indicated that this order of removal is deemed notice to every person who shall have entered into a recognizance. It would seem, therefore, that, the court having complied with all requirements relating to a removal of a cause, all parties involved in the criminal prosecution have notice; and, since we have already found that a witness shall attend the trial either in the original county or the county to which removed, there is no situation where he may appear without properly being subpoenaed, assuming, as we did in the first paragraph, that the question of the subpoena is not involved.

Before reaching a conclusion we wish to point out that the accused has the right of compulsory process and this is guaranteed him under our Constitution, Article II, Section 22, page 71c. And, further, the circuit court has inherent power in criminal cases to compel attendance or the production of witnesses and we cite as authority Article VI, Section 22, Missouri Constitution; State ex rel. Rudolph v. Ryan, 38 S. W. (2d) 717, 327 Mo. 728; and Ex parte Marmaduke, 4 S. W. 91, 91 Mo. 228, 60 Am. Rep. 250.

CONCLUSION

From the above and foregoing we conclude that a witness once subpoenaed in a criminal case shall attend that case until the case is ended and he is discharged. Further, that no court order other than the removal order is necessary. That the removal order is notice to the defendant, the witnesses and others, of the removal, and no further order is necessary. That upon a change of venue a witness once subpoenaed need not be resubpoenaed where no recognizance is taken.

Respectfully submitted,

APPROVED:

L. I. MORRIS
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

LIM:CP

SCHOOLS: Board of directors of consolidated school districts have authority to sell property of an annexed school district.

May 12, 1943.



Hon. J. F. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Smith:

The Attorney-General wishes to acknowledge receipt of your letter of May 7, 1943, in which you request an opinion of this Department. Your request for an opinion, omitting caption and signature, is as follows:

"A school house and grounds of a district that is voted into a consolidated district - who has the right to sell building and grounds that was owned by the district and how?"

There seems to be no direct statute which specifically provides for the disposition of the property of a school district which has been annexed to a consolidated school district. However, by referring to several sections of the statute we can arrive at a solution to your problem.

We first wish to cite you to Section 10497, R. S. Mo. 1939, which provides as follows:

"Whenever by reason of the formation of any consolidated school district a portion of the territory of any school District has been incorporated in the consolidated district, the inhabitants of the remaining parts of the districts shall proceed in accordance with section 10486, providing for the annexation to

city school districts and the consolidated district shall be governed by the same provisions as govern city school districts in such cases. The inhabitants of the remaining parts of the districts may also annex themselves to any other adjoining district or districts by filing a petition asking to be so annexed with the clerk or clerks of the district or districts to which they desire to be annexed and by also filing a copy of all such petitions with the clerk of the county court: Provided, that in the formation of any consolidated school district, as provided in this article, no district shall be divided unless the part left shall contain at least eight square miles of territory and twenty children of school age, or an assessed valuation of fifty thousand dollars and twenty children of school age."

As can be seen from the above quoted statute direct reference is made to parts of a school district which have not been incorporated in the formation of a new consolidated school district. It will further be noted that such remaining parts of the school district may be annexed to the consolidated district in accordance with the provision of Section 10486, R. S. Mo. 1939. Furthermore, it is provided in this section that the consolidated school district shall be governed by the same provisions as govern city school districts in such cases. Therefore it is necessary that we inspect Section 10486, supra. Section 10486 refers to the annexation to school districts when corporate limits are extended, and will not aid us in arriving at the power of disposition of the school property of the annexed school district. However, since Section 10497, supra, states that the consolidated districts shall be governed by the same provisions as govern city districts in such cases, we will next inspect Section 10484, R. S. Mo. 1939, which is entitled "Annexation to town and city districts," and which section provides as follows:

"Whenever an entire school district, or a part of a district adjoining any city, town or village school district, desires to be attached thereto for

school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting for said purpose by giving notice as required by section 10418. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action. In case an entire district is thus annexed, all property and money on hand thereto belonging shall immediately pass into the possession of the board of said city or town school district; but should only a part of a district be annexed thereto, said part shall relinquish all claim and title to any part of the school property and money on hand belonging to said original district, and that portion of the district remaining must contain within its limits thirty children and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory. The voting at said special school meeting shall be by ballot, as provided for in section 10467, and the ballots shall be 'for annexation' and 'against annexation,' when the whole district is to be annexed, but if only a part is to be annexed, the ballots shall read 'for release' and 'against release.'

Attention is called to the provision in the statute above, that where an entire district (which apparently is the instant case) is annexed to any city, town or village school district, that all property and money on hand thereto belonging, shall immediately pass into the hands of the annexing district. In other words, in the instant case when the school district was annexed by the consolidated school district, all of the property or money belonging to such annexed district immediately became the property of the consolidated district. Therefore, the board of directors of such consolidated school district will have the management and control over such newly acquired property. As to the right of the directors of such consolidated school district to dispose of such property, we will cite you to the case of Crow v. Consolidated School District No. 7, 36 S. W. (2d) 676, 1. c. 678, in which we find the following language of the court:

"But the power to establish schools necessarily carries with it the power to abandon other schools no longer required, and said section confers upon the board the power to dispose of such property."

In the decision above the court also made the following statement:

"But in our opinion Section 11241 (R. S. Mo. 1919) was really intended to give to the board of education in consolidated school districts full power in the matter of selecting schoolhouse sites or changing sites whenever, in their judgment, such change should become necessary." (Citing cases.)

The above quotation is cited in this opinion for the purpose of showing that the court in the Crow case felt that Section 11241, R. S. Mo. 1919, would apply in this case. Section 11241, R. S. Mo. 1919, is now known as Section 10471, R. S. Mo. 1939. Such section prescribes the following:

"When the demands of the district require more than one public school building therein, the board shall, as

soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 10627 may be pursued; and whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

As will be noted from the last clause in the above statute, the board of the consolidated school district is authorized to advertise, sell and convey property in the school district which is no longer required to be used by such district.

Under the statutes and case cited in the above opinion, we are of the opinion that the board of directors of a consolidated district which has annexed another district, has the power and authority to dispose of such property if it is no longer needed for school purposes in such consolidated district.

Conclusion

Therefore, it is the opinion of this Department that the board of directors of the consolidated district which has annexed another district, has the right to sell the building and grounds that were owned by the district annexed, provided such

Hon. J. P. Smith

-6-

May 12, 1943

property is no longer required to be used by the consolidated school district.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

FENCES : Division fences between cemeteries and lands owned
DIVISION : by private individuals subject to statutes relating
CEMETERIES: to division fences.

May 13, 1943



Hon. J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"Where an acre or more of ground under deed to Church, or some organization, for Cemetery purposes, and the owner of the land around the cemetery ground pastures the land and lets the stock run on the land used as a cemetery.

"Who has to fence the cemetery ground to keep the Cemetery ground being pastured the owner of stock and land around the cemetery, or the owner of the cemetery?

"And if the ground is used as a cemetery no deed having been made to any one for the cemetery, who should fence it?"

In our research we do not find any statute applying especially to division fences bounding cemeteries.

Section 15262 makes provision for securing family burying grounds. Section 15263 gives county courts control of such grounds and makes provision against trespassing on such grounds, but nothing is stated in these statutes with reference to division fences.

The common law rule on division fences was applicable in cases such as you submit prior to the enactment of our statutes on division fences. In the case of McLean v. Berkabile, 123 Mo. App., 647, 652, the court stated the rule as follows:

"In such cases, where no division fence has been established between the farms, either under the provisions of chapter 28, Revised Statutes 1899, or by the agreement of the parties, the common law rule prevails and each proprietor is required to confine his domestic animals to his own land and is liable to his neighbor for any damages sustained from their escape to the land of the latter.
* * *"

Section 14574 R. S. Mo., 1939, provided as follows:

"Whenever the fence of any owner of real estate, now erected or constructed, or which shall hereafter be erected or constructed, the same being a lawful fence, as defined by sections 14569 and 14570, serves to enclose the land of another, or which shall become a part of the fence enclosing the lands of another, on demand made by the person owning such fence, such other person shall pay the owner onehalf the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence."

The court in the McLean v. Berkabile case, supra, in construing the section said at l. c. 652:

"Under the statute, chapter 28, Revised Statutes 1899, either proprietor may compel the establishment and maintenance of a lawful fence and provision is made for the division of such fence between the parties for the purpose of repairs and it has been held that a division fence may be brought under the terms of the statute by the agreement of the parties on the obviously correct principle that a proprietor may do by voluntary agreement that which his neighbor may compel him to do by law. (Mackler v. Cramer, 32 Mo. App. 542.) But to constitute a division fence within the purview of the statute, whether or not such fence be the subject of a contract between the parties, it must be located

May 13, 1943

along the boundary line (Sims v. Field, 74 Mo. 139), and must conform to the specifications prescribed in the statute. (Secs. 3294, 3295.)"

From sources outside your request, we have ascertained that Webster County has adopted the stock law.

CONCLUSION

From the foregoing, it is the opinion of this department that if no division fence has been established between the cemetery and privately owned lands, then the common law rule applies and the proprietor owning the private lands would be required to confine his domestic animals to his own land, and a failure ~~so~~ to do would subject him to damages for their trespassing on cemetery grounds thereto adjoining.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

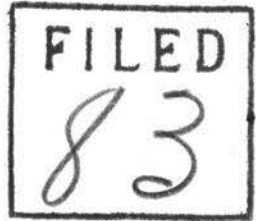
ROY McKITTRICK
Attorney General

TWB/mh

TAXATION
COLLECTOR'S SETTLEMENT
COUNTY COURT:

County Court's procedure in making
settlement with collector on delinquent
lists.

May 14, 1943



Mr. Ramey Smith
Clerk of the County Court
Ava, Missouri

Dear Mr. Smith:

This is in reply to your letter of recent date where-
in you submit the following questions:

"1. What lists should Collector file with
County Court? Such as Out Lawed, Erroneous.
Please enumerate.

"2. What action should Court take in case
where Collector has not required Merchant
to fill Mercants Bond, Merchant has not
paid his tax, and the Collector asks Court
to accept or give credit for the amount as
erroneous assessment?

"3. What action should Court take where
Collector asks Court to give credit as Out
Lawed Personal the Personal Tax of Numerous
tax payers whom the Court know of their own
personal knowledge would have to pay if
proper action to collect said tax by Collec-
tor had been taken but where no suits to
collect same have been instituted by Collec-
tor?"

We find that in the first instance, the collector is
charged with certain taxes which are extended on the books by
the county clerk. Under Sec. 11048, R. S. Mo., 1939, the
county clerk extends the taxes which have been levied on the
assessments shown on the assessor's books. Then under Sec.
11049, R. S. Mo., 1939, the clerk makes a complete statement
of the assessment and taxes which have been charged on the
books. This statement, after having been recorded, is for-
warded to the State Auditor.

Under Sec. 11052, R. S. Mo., 1939, the collector gives
his receipt for these books with the amount of taxes stated

therein and the collector is then charged with the whole amount of taxes on such books.

Under Sec. 11053, R. S. Mo., 1939, the collector also subscribes to a receipt for the tax books endorsed on the aggregate abstract thereof. This abstract with the collector's receipt endorsed thereon and properly certified is forwarded to the State Auditor.

Under Sec. 11056, R. S. Mo., 1939, the collector is required to give a bond for the faithful performance of his duties as required by law, and that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March thereafter.

In State ex rel. Rice, et al. v. Powell, 44 Mo. 436, it was held that an action on the bond of the collector was the proper procedure against the officer for wrongful acts of such officer. Following this authority, if the officer fails to punctually and faithfully collect the taxes charged on the books, then an action on the bond of the official is in order.

In Vol. 61, C. J., P. 1028, Sec. 1325, the rule applicable here is stated as follows:

"A tax collector may be held liable not only for his actual collections but also for taxes which he might have collected by due diligence and by the employment of such legal remedies as are within his authority, including the penalties charged against delinquent taxpayers for their delay and interest on the amount chargeable to the collector from the time of a demand on him. This is true notwithstanding difficulty in collecting within the time prescribed by law or an alleged irregularity in prior proceedings which presented no actual or legal obstacle to collection. * * * * *

Vol. 61, C. J., p. 1034, Sec. 1339, also states the rule as to the liability of bondsmen as follows:

"Failure of a tax collector to collect the legal taxes within the time required by law is a breach of the condition of

May 14, 1943

his bond for which his sureties are liable, at least to the extent of such taxes as were lost through his remissness or neglect, and where no reason, valid in law, for failure to collect is shown; * * * * *

Section 11086, R. S. Mo., 1939, provides in part as follows:

"The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent: * * * * *"

It will be noted from this section that the collector is required to diligently endeavor to collect the taxes charged on his books.

In your first question, you refer to "outlawed" and erroneous lists. So far as the collector being charged and credited with taxes, we find no statute allowing any credit for an outlawed list. When he receives the tax books, then under his bond he is charged with the collection of all taxes therein, except such taxes as may have been found erroneous by the court under Sections 10998, 11122, 11214, or the State Tax Commission, under Section 11028.

The personal and land delinquent lists are made up by the collector under Section 11110, R. S. Mo., 1939, which provides in part as follows:

"Whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make lists thereof, one to be called the 'personal delinquent list,' in which shall be stated the names of all persons owing taxes on personal property, where taxes cannot be collected, alphabetically arranged, with the amount due from each, * * * * *

Section 11166, R. S. Mo., 1939, provides as follows:

"All back taxes, of whatever kind, whether state, county or school, or of any city or incorporated town, appearing due upon delinquent real estate, shall be extended in the 'back tax book' made under this article, and in case the collector of any city or town shall have omitted or neglected to return to the county collector a list of delinquent lands and lots, as required by section 11202, the present authorities of such city or town may cause such delinquent list or lists to be certified, as by said section contemplated, and such delinquent taxes shall be by the county clerk put upon the 'back tax book,' and collected by the collector under authority of this chapter; and all the provisions of sections 11202, 11203, 11204, 11205 and 11206, not inconsistent with this chapter, shall be and remain in full force and unaffected by this law: Provided, that in all cases where the

auditor or other proper officer is required by provision of charter of any city of five thousand or more inhabitants to make the list for city delinquent taxes in this section, provided, and to deliver the same to the collector or other proper officer of such city, such collector or other proper officer shall proceed to collect such delinquent list in such 'back tax book,' so made out and delivered to him by the auditor or other proper officer of such city, in the manner and under authority prescribed by this law, and the chapter to which this is amendatory."

This is another step provided by the lawmakers to collect personal taxes.

The collector under Section 11089, R. S. Mo., 1939, makes his settlement with the county court. This section provides as follows:

"At the term of the county court to be held on the first Monday in March, the collector shall return the delinquent lists and back tax books, and in the city of St. Louis the uncollected tax bills and back tax books, under oath or affirmation, to such court, and settle his accounts of all moneys received by him on account of taxes and other sources of revenue, and the amount of such delinquent lists, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to him on his settlement. Before allowing the collector such credit for any delinquent lists, the county court shall make special inquiry and be fully satisfied that he has used due diligence to collect the same, and that he could not find any personal property of the taxpayer out of which to make the taxes. If the court is satisfied that there are any names on the list of persons who have personal property out of which the taxes could have been made, it shall, in passing upon such lists, strike such names therefrom."

May 14, 1943

It will be noted that this section specifically provides that the collector shall not be allowed credit on a delinquent list, until he shows the court that he has exercised due diligence to collect the tax, and if he has not, then the court should strike such lists from the delinquent list, which would have the effect of leaving the collector charged with the tax.

In determining whether or not the collector has used due diligence in trying to collect taxes which he has returned, the county court would be authorized to consider whether or not he had used the procedure prescribed in Section 11086 and Section 11166, supra, to enforce the payment of such taxes. If he has not, then he should not be allowed credit by the delinquent list.

On your second question, we are enclosing copy of an opinion to Mr. Leo J. Harned, Prosecuting Attorney of Pettis County, dated February 10, 1942, which we think answers this question.

CONCLUSION

It is therefore the opinion of this department that the county court is not authorized to give the collector credit on his settlement for delinquent taxes until such court is satisfied that the collector has used due diligence in attempting to collect such tax, and that if the collector has permitted such taxes to be outlawed without having used due diligence, in attempting to collect same, an action on his bond is the proper procedure.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:NSH

OFFICERS: Sheriffs may serve civil and criminal process in military reservations.

June 2, 1943.



Hon. Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

This is to acknowledge receipt of your letter of May 27th, 1943, in which you request the opinion of this Department on the following:

"Does the Sheriff of Newton County have the authority to serve warrants and civil processes in the Camp Crowder military reservation. I would like to know just what the extent of his authority would be."

This department has no information as to the ownership of the land occupied by Camp Crowder. The only method of obtaining this information accurately, is by examining the deed records in the counties wherein this military reservation is located. However, we feel that under the condition of the law at the present time, it makes no difference, as far as your problem is concerned, as to the ownership of this property.

The United States Government is given the authority to acquire land for certain purposes by the Federal Constitution, one of such purposes being for "forts." The provision in the Constitution is Article I, Section 8, Clause 17, and provides as follows:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat

of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; *

It is clear from this provision that the United States Government can acquire property for use in projects like Camp Crowder by purchasing such property with the consent of the State Legislature of the State wherein such real estate lies.

The Legislature of this State has given permission to the United States Government to acquire land in this State for certain purposes. This permission is of course in the form of a statute, and is Section 12691, R. S. Mo. 1939. This section provides as follows:

"The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

However, as to the regulation of civil and criminal process in such government acquired territory, we find that Section 12693, R. S. Mo. 1939, prescribes the following:

"The jurisdiction of the state of Missouri in and over all such land purchased or acquired as provided in section 12691 is hereby granted and ceded to the United States so long as the United States shall

own said land: Provided, that there is hereby reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon."

This department feels that there are possibly some questions as to whether Section 12691, supra, would apply to a military reservation, since the statute gives the Government the authority to acquire lands for the purpose of "establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses." However, a discussion as to this question is unnecessary since the State will still retain permission to serve both civil and criminal process in this territory even though this statute does or does not apply. If the statute applies and the United States has permission to purchase this property, the Legislature has specifically retained the right to execute civil and criminal process under Section 12693, supra. If the statute does not apply, then if the Government has purchased the land, it has done so without legislative authority as required by the Federal Constitution, and consequently under the decisions of the court the State wherein the property lies would still retain political jurisdiction. In the case of *United States v. San Francisco Bridge Co.*, 88 Fed. 891, the District Court of California held that a state retains complete and exclusive political jurisdiction over lands within its limits purchased by the United States as a site for a public building, unless such purchase was with the consent of its legislature, or jurisdiction had been otherwise ceded to the United States, and any offense against its laws committed thereon is punishable in its courts.

The only other method by which the United States can gain exclusive possession and control of property within a state would be by the Legislature ceding property to them. We can find no act of the Legislature which does cede to the Government the property occupied by Camp Crowder.

June 2, 1943

Therefore, if the property has been purchased by the Government, the State in any instance has retained political jurisdiction and has the right to issue both civil and criminal process in such military reservation.

Conclusion

Therefore, it is the opinion of this department that the Sheriff of Newton County has authority to serve warrants and civil processes in the Camp Crowder Military Reservation.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

JSP:EG

APPROVED:

ROY McKITTRICK
Attorney-General

ESCHEAT:

State is entitled to possession of escheated property; no provision governing what agency of state has charge of such property.

July 12, 1943



Honorable Forrest Smith, Secretary
Board of Fund Commissioners
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of July 2, 1943, as follows:

"The Board of Fund Commissioners of the State of Missouri respectfully request your legal opinion construing Section 625 to 640 inclusive, Article 1 Chapter 3, R. S. Missouri 1939 relating to the procedure of escheating lands and your opinion upon the following statement of facts and questions of law, to wit:

"Mr. Thos. R. Madden, Administrator of the Estate of Bernhard Nickel, deceased, St. Louis City, Missouri, has notified the Circuit Attorney of the City of St. Louis and the State Auditor of the State of Missouri that said Bernhard Nickel died leaving no heirs or representatives capable of inheriting the personal and real estate belonging to said Bernhard Nickel, deceased, and that upon final settlement of said estate in the probate court of the City of St. Louis, Missouri, cash in the sum of \$519.11 was remitted to Wilson Bell, State Treasurer and has been deposited in the escheat fund of the State of Missouri and that included among the assets of the estate of the said Bernhard Nickel was a piece of real estate situated in the City of St. Louis and

known as 1422-24 So. Cardinal Avenue, which is improved real estate. The real estate in question is subject to a deed of trust to secure a loan of \$1,000 made on August 18, 1938, of which there remains unpaid as of December 31, 1942, the sum of \$689.46. The property in question produces income sufficient to pay monthly installments on the loan, taxes, insurance, maintenance and a small balance monthly which is subject to escheat.

"The Board of Fund Commissioners would appreciate being advised whether or not, under the laws of this state, particularly Chapter 3 relating to escheats, said Board has the authority to manage, control, rent, lease or sell real estate which is entitled to escheat to the State of Missouri?

"Also, whether or not said Board has the right and authority to pay from the income of the property in question or from moneys credited to said estate in the escheat fund, payments on loan, insurance premium, taxes, collection fees, cost of perfecting title to said real estate in the State of Missouri and all incidental expenses relating to the management and control of the property?

"The Board would appreciate being advised as to what the procedure is, in perfecting title to said real estate in the State of Missouri and whether or not said proceedings outlined in Section 625 R. S. Mo. 1939 should be commenced within the period of five years after the death of the person last seized or that said proceedings be commenced and instituted after five years from the date of the death of the deceased and who has title to the property here in question during the period of administration of the estate and who has title to the property after final settlement?

"The Board would appreciate being advised as to what are its duties and authority generally over the Escheat Fund of the State of Missouri under the provisions of Article 1 Chapter 3 and Articles 5 Chapter 87 R. S. Mo. 1939?"

We rendered an opinion on this subject August 11, 1942, to F. M. Brady, Prosecuting Attorney of Benton County, which covers your question as to when the prosecutor may commence the proceedings to determine that land has escheated. We there concluded he might commence the proceeding at any time after the death of the person last seized. We do not read the statutes as prescribing any period within which, or after which, the prosecutor must act. The only limitation there, if it can be so classed, is that if the property be sold before the prosecutor acts and within five years of the death of the person last seized, in order to pay his debts, then the prosecutor may not start action to have the fact of escheat judicially determined. A copy of that opinion is enclosed.

However, in the re-examination of that opinion we have concluded it is partially wrong in that we concluded therein that after a judgment of escheat the sheriff held the property in his possession pending its disposition.

In connection with that question it appears that Section 633, R. S. Mo. 1939, provides:

"When judgment is rendered for, and the title to such real estate described in the information is vested in the state, a writ shall be issued to the sheriff of the same county, commanding him to seize said real estate."

Section 634, R. S. Mo. 1939, speaks of this writ as a "writ of possession." That term is defined in 71 C. J. p. 1629, Section 9 to "designate any writ by virtue of which the sheriff is commanded to place a person in possession of real or personal property." Also, it will be noted that Section 629, R. S. Mo. 1939, in speaking of defaults states that judgment shall be rendered for the state "and it shall be seized and possessed of the lands."

Possession is defined in 49 C. J., p. 1093, Section 2, to mean:

"The act of possessing, actual care, control, and management."

In the following Section 3, "possession of land" is defined as:

"The actual control by physical occupation, the holding of it and the exercise of dominion over it, the immediate exclusive dominion of it, that position or relation which gives to one its use and control, and excludes all others from a like use or control."

Further, in 30 C.J., p. 1183, Section 19b(1) in speaking of "Escheats" it is said:

"When title vests in the state it carries with it the right to possession, and to the rents and profits accruing after the vesting."

It, therefore, seems clear that the law contemplates that upon the judgment of escheat the state is vested with title and possession of the land and the right to the rents and profits accruing thereafter.

The remaining questions deal with what officer or agency of the state is to exercise the "possession" of the property that is vested in the state. Diligent search has failed to reveal a single line of law which says that the Board of Fund Commissioners has any duties to perform in that connection. Examination of the laws applicable to escheats, from their original enactment (R. S. Mo. 1825, pp. 356-361, Secs. 1-9) through every amendment and revision up to date, discloses at no time has the General Assembly ever stated what agency of the state is to exercise control and management over escheated property. The statutes from 1835 to 1865 contained provisions whereby the General Assembly might order escheated property sold at any time, rather after the five year period, which was even then prescribed and that may account for the absence of any authority for an agency of the state to exercise possession of such property, since the General Assembly might have ordered it to be immediately sold.

July 12, 1943

Section 641, R. S. Mo. 1939, provides:

"The state auditor shall keep just and accurate account of all money paid into the state treasury and all land vested in the state as aforesaid."

This section might be thought to vest the control of such land in the auditor, but we are unable to find where any such broad meaning has been ascribed to keeping an account.

We, therefore, conclude that neither the Board of Fund Commissioners, nor any other officer or agency of the state, has been given authority by the General Assembly to exercise control and management over real estate that has been determined to have escheated to the state.

Respectfully submitted,

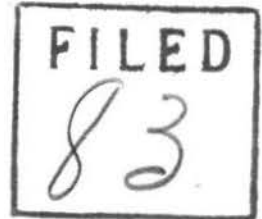
LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney-General

OFFICERS: Discussion of question of appointment of
LEGISLATORS: legislators to positions in state departments.

July 29, 1943



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of
July 13, 1943, as follows:

"Since the Constitution has been changed paying the members of the legislature \$125.00 a month straight time whether the legislature is in session or not, I would like an opinion from your office as to whether a member of the legislature could be employed by any department of the state government, thereby receiving money from two different sources from the state treasury for the same period of time.

"I would also like an opinion as to whether or not a member of the legislature could be employed as a clerk during the Constitutional Convention."

On November 8, 1937, in an opinion to the Honorable Lloyd C. Stark, we had occasion to consider this question. In that opinion we concluded that nothing prevented a member of the General Assembly from holding another position in the State Government provided such position was an "employment" as distinguished from an "office". A copy of said opinion is enclosed. That opinion, however, did not involve the precise question now presented nor did it consider the terms of Article 3 and Section 15 of Article 4 of the Constitution. Then, the legislators, being on a per diem only during sessions, if employed by a state department at a time when the General Assembly was not in session (which, in fact, was the

only time any were employed), were not drawing compensation from two departments or branches of the state government at the same time.

On November 3, 1942, the Constitution was amended with respect to the compensation of a member of the General Assembly, changing said compensation from a per diem during sessions to a flat sum per month throughout the term for which the legislator was elected. That provision is now Section 16, Article 4 of the Constitution which is as follows:

"The members of the General Assembly shall severally receive from the State Treasury for their services a monthly salary of one hundred and twenty five dollars per month commencing as of January 1st next following the adoption of this Section, and upon certification by the President and Secretary of the Senate, and by the speaker and chief clerk of the House of Representatives, as to the respective members thereof, the State Auditor is hereby directed and empowered to audit and the State Treasurer to pay such compensation without legislative enactment. The members of either house shall also receive the sum of one dollar (\$1.00) for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route."

All departments of the State have power, either by statute or necessary implication (59 C. J. p. 128, Sec. 188), to appoint necessary assistants and personnel. Also, the Constitutional Convention by Section 3, Article 15 of the Constitution is given express power "to appoint such officers, employees and assistants as it may deem necessary." There is, however, a general limitation, applicable to all appointing power, whether derived from the people through their representatives, the General Assembly, or directly through Constitutional provisions. This limitation appears in Section 12, Article 4 of the Constitution, providing:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; * * * * *

The background of this limitation appears in other Constitutional provisions. Section 15, Article 4 of the Constitution requires each legislator to swear that:

"* * * I will support the Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office; and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."

The United States Constitution, Section 4, Article 4, guarantees to every State "a republican form of government" which implies that each shall have a government democratic in form, with Constitutional protection for minority rights, in which the system of checks and balances is operative through division of the government into three branches, none of which is to exercise the powers committed to another branch. Missouri has such government, the division into three branches being specified in Article 3, which, after specifying the separation, states:

"* * * no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, * * * * *

It clearly was this provision, which has for its purpose to insure that we will have a republican form of government with its systems of checks and balances, that evoked the

adoption of Section 12, Article 4. Perhaps the writers of that instrument, in formulating the provisions incorporated in Article 3 and Sections 12 and 15 of Article 4, were aware of the truisms that: "The man who gives me employment, which I must have or suffer, that man is my master" (Social Problems, H. George, Ch. 5); and that: "No man can serve two masters" (Matthew 6:24). At least the provisions to which we have referred are admirably suited to prevent a member of the executive branch of the government from becoming the master of a member of the legislative branch through the simple expedient of giving him a job, and, by reason of being his master, prevent him from faithfully performing the duties of his office, which he swears to do. A servant, being subject to the will of the master, would not be the free legislator contemplated by the Constitution when dealing with legislation affecting his master. Nor could the master, in the executive branch of government, perform his duties with efficacy because of inability to command complete obedience of his servant, who, being in the legislative branch, holds the purse strings on his master.

In such a situation lies the destruction of our government of checks and balances in which each branch checks the others and is in turn checked by them.

Another implied limitation on the power to appoint springs from the rule of public policy that no person can hold two positions in the state government, the duties of which are incompatible. State ex rel. Smith v. Bowman, 184 Mo. App. 549; State ex rel. Walker v. Bus, 135 Mo. 325. Whether that principle has application to the present situation, we do not stop to consider, for we are of the opinion that the appointment of legislators to positions in the other branches of government makes possible the destruction of the doctrine of separation of the powers of government with its system of checks and balances, and thus the question is too grave for the Attorney General to resolve.

We have made an exhaustive search for some judicial pronouncement on this question but find none in this or other jurisdictions. In view of the absence of an analogous judicial decision on the extent of the ban, on appointing legislators to positions in state departments, that arises from provisions like Article 3 and Sections 12 and 15 of Article

July 29, 1943.

4, we feel that the question should be left to the courts to settle, when and if the question is presented in a proper case.

What we have said, however, cannot be applied to the appointment of a legislator as a Clerk in the Constitutional Convention. While the Convention's power to appoint assistants and employees is subject to the limitations provided in Section 12 of Article 4, the Convention is not one of the three branches of government created in Article 3. Further, the fact that a member of the Convention might, by reason of giving employment to a legislator, become his financial master, can in no way lead to destruction of our government of checks and balances. The Constitutional Convention is not dependent upon the General Assembly for any legislation, nor does the General Assembly hold the purse strings on the Convention. Thus there would be no time when the legislator would have to consider legislation affecting his financial master. And since the General Assembly does not hold the purse strings on the Convention, the member of the Convention would not be hampered in demanding obedience from his servant, the legislator.

The question of whether a legislator may be a Clerk in the Convention turns upon whether the position to which the member of the General Assembly is appointed is an employment or an office. The tests for determining this question as formulated in the enclosed opinion are, (1) the taking of an oath; (2) the giving of a faithful performance bond; (3) definite duties involving the exercise of some portion of the sovereign power; (4) continuing and permanent nature of the duties enjoined; (5) right of a successor to the powers, duties and emoluments, and (6) whether accountable for misfeasance or non-feasance.

While it is said that the presence or absence of a single one of these indicia is not conclusive, and that no definite test can be stated that will cover every situation that may arise, we are of the opinion that a clerk (in the sense that we understand the term to mean a position similar to that of a clerk of the General Assembly) in the Constitutional Convention does not hold an office, and consequently a member of the General Assembly is not prohibited from being appointed to or from holding such position.

Hon. Forrest Smith

-6-

July 29, 1943.

CONCLUSION

Therefore, while we are of the opinion that a member of the General Assembly may serve as a clerk in the Constitutional Convention, we express no opinion on whether said member may be appointed to a position in another branch of the State government.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:jn

RECORDER: May not record statement that records of General Land Office show a patent has been issued.

August 16, 1943.

Mr. Roy G. Skillman
Recorder of Deeds
Howard County
Fayette, Missouri



Dear Sir:

This will acknowledge receipt of your letter of July 21, 1943, as follows:

"As we understand it, before instruments can be recorded, they must be duly acknowledged. Therefore, are we justified in recording the following affidavit without acknowledgment being attached. If so please refer us to section authorizing such recording.

"The instrument under question is as follows:

"ATTORNEY'S CERTIFICATE OF LAND PATENT

"I HEREBY CERTIFY That I have examined the records of the General Land Office and find that the N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, 240 acres, Section 28, Township 49-N, Range 16-W, 5th P. M., District of Franklin, State of Missouri, was entered by Daniel Durbin on January 17, 1820 - August 27, 1821 with Cash Certificate #265, Patented to Henry Knaus, assignee, under date of July 1, 1824.

"Patent recorded, Misc. Volume 99, Page 256.

B. P. Holzberg
Attorney at Law.

"Remarks: Patent sent to local office.

August 16, 1943.

"One of our clients has said that there is no need for an acknowledgment of the above mentioned document. We would like to know for our benefit as well as for the benefit of our client."

Section 13161, R. S. Missouri 1939, makes it the duty of a recorder to record certain "instruments of writing, of or concerning any lands or tenements, * * * which shall be proved or acknowledged according to law * * *". It is to be noticed that the Attorney's Certificate which you have been asked to record is not proved or acknowledged in any manner, consequently, there is nothing in Section 13161, supra, which requires, or even permits, this Certificate to be recorded.

Section 13171, R. S. Missouri 1939, deals specifically with patents. It provides:

"All patents for lands lying within the state of Missouri, granted to any person or persons by the president of the United States or the governor of this state, may be recorded in the office of the recorder of the county in which the lands are situated; * * * " (Underscoring supplied).

The Attorney's Certificate, supra, appears to concern a patent granted by the president of the United States. Thus, it is formally recorded in the records of the General Land Office of the United States. In *Wilcox v. Phillips*, 260 Mo. 664, the court in discussing Sections 13161 and 13171, supra, said (l. c. 680):

"* * * to pass title or impart notice neither a patent from the United States nor a patent from the State itself needs record in the county in which the land is situate. 'A patent from the United States for land need not be delivered or recorded. Title by patent from the

United States is title by record; and though it is usual to deliver a patent to the claimant, as in case of deeds, yet delivery of it is not necessary. "The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer called the 'recorder' is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction -- the legally prescribed act which completes what Blackstone calls 'title by record,' --and when this is done the grantee is invested with that title. The statutes in regard to recording do not apply to conveyances by a State. Such conveyances may be recorded, and generally are, but their effect as vesting title and affording notice is not dependent upon their being recorded." (2 Jones, Real Prop., secs. 1377-1378; Mosher v. Bacon, 229 Mo. l. c. 358 et seq.) The statutes of the State of Missouri, recognizing the fact that patents emanate from the General Government and evidence acts of that Government as overlord, do not require as a condition precedent to vesting title or imparting notice that such patents be recorded in the county in which the land is situate. It would be uncommonly revolutionary and singular if they assumed such hostile and unconstitutional attitude. To the contrary, our statutes are merely permissive and use the phrase 'may be recorded.' (R. S. 1909, sec. 10390.) Conveyances that must be recorded are mentioned in another section. (Ibid., sec. 10381.)"

From this case, the law appears to be that a patent from the United States is not required to be recorded with a county recorder in order that the title passes or in order to impart notice of such conveyance. The Court clearly

Mr. Roy G. Skillman,

-4-

August 16, 1943.

points out that our law only provides that such may be recorded with a county recorder, under Section 13171, and that it is not one of the instruments that must be recorded under Section 13161.

Section 13172, R. S. Missouri 1939, provides:

"All copies of patents so recorded, or which may have been heretofore recorded, duly certified by the recorder, under his official seal, shall be received in all courts in this state as prima facie evidence of the contents of such patents."

Where the statute provides that a patent may be recorded, and it is apparent from Section 13172 and the rule of the Wilcox case, that the only purpose for such is in order that some local record be created which may be used as evidence of such patent, it is difficult to see why anyone would desire to record, in lieu of such patent, this Attorney's Certificate. Even if recorded it would not serve to impart notice of the conveyance or serve to create a local record for use as evidence. In view of its complete uselessness, it is even more difficult to understand that our law permits such Certificate to be recorded. We do not think that Section 13161 requires that such Certificate be recorded and can find no authority that permits it to be recorded.

CONCLUSION

It is therefore our opinion that a signed statement to the effect that the records of the General Land Office of the United States show that a particular patent has been issued, may not be recorded by a recorder or deeds under the laws of this state.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LLB:jn

8044
LAWS: Effective date of under ^{Sec.} par. 36, of Constitution
as amended.
COURTS, TERMS OF: Effect of change of terms by legis-
lative enactment (House Bill No. 509)

August 19, 1943



Hon. John B. Smoot
Prosecuting Attorney
Scotland County
Memphis, Missouri

Dear Sir:

We are in receipt of your letter of August 16, last,
requesting an opinion of this office, which letter is as
follows:

"House Bill No. 509 amending Section 2202,
Article 3, Chapter 10, Revised Statutes of
Missouri, 1939, enacted by the 62nd Gen-
eral Assembly and approved by the Governor
on July 26, 1943, changes the terms of court
for the 37th Judicial Circuit of Missouri.
The Act provides for three terms instead of
two. Prior to the enactment of the above
House Bill, the terms of court as provided
by Section 2202 Revised Statutes of Missouri,
1939, for Scotland County was the third Mon-
day in May and the second Monday in November.
Under the amendment three terms are provided
for, namely, the third Monday in May, the
first Monday in September and the first Monday
in January.

"The act provides for no effective date nor
does it have a saving clause to avoid con-
fusion of terms of the present court. A
number of suits and alias writs returnable
to the November Term of the Circuit Court
have been served. The above referred to
House Bill does not provide for a November
Term but abolishes said term.

"May I have the opinion of your office rela-
tive to the effective date of the amended
law and your opinion as to whether or not a
November Term 1943 of the Circuit Court
can be held."

House Bill 509 as enacted is as follows:

"Section 1. That Section 2202, Article 3, Chapter 10, Revised Statutes of Missouri, 1939, relating to Thirty-seventh Judicial Circuit, be and the same is hereby amended by striking the words beginning in line four, "on the third Monday in May and the second Monday in November", and inserting in lieu thereof the following, "on the first Monday in January, the third Monday in May and the first Monday in September", so that, when amended, said section shall read as follows:

"Section 2202. In the county of Clark, on the first Mondays in April, August and December; in the county Scotland, on the first Monday in January, the third Monday in May and the first Monday in September; in the county of Schuyler on the first Mondays in May and October."

During the session of the 62nd General Assembly, held in Jefferson City, beginning in January, 1943, there was a Concurrent Senate Resolution presented (Resolution No. 2) which recommended and resolved that an amendment to the Constitution be made declaring that no law passed by the General Assembly should become effective until ninety days after the signing of such laws by the Governor of this State. This Resolution was presented in the form of an Amendment to the Constitution on April 6, 1943, to the electorate, and the same passed. Said Amendment provides as follows:

"Amendment repealing Section 36, Article IV, Missouri Constitution, and enacting new section providing effective date of laws of General Assembly, except appropriation acts and emergency acts.

"JOINT AND CONCURRENT RESOLUTION submitting to the qualified voters of the state of Missouri and amendment repealing Section 36, of Article IV of the Constitution of Missouri and enacting in lieu thereof a new section relating to the same subject establishing the effective date of laws, to be known as Section 36 of Article IV.

"Be it resolved by the Senate, the House of Representatives concurring therein:

"That at a special election to be called by the Governor for that purpose, or at the general election, to be held in this state on the first Tuesday after the first Monday of November in the year 1944, there shall be submitted to the qualified voters of this state for adoption or rejection a proposition to repeal Section 36 of Article IV of the Constitution of Missouri relating to the effective date of laws, and to enact in lieu thereof a new section relating to the same subject matter to be known as Section 36 of Article IV and to read as follows:

"Section 36. No law passed by the General Assembly, except appropriation acts, shall take effect or go into force until ninety days after enactment and approval thereof as otherwise provided by this Article, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

Section 659, R. S. Mo. 1939, as follows:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

"(a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal or a law making an appropriation for the

current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval.

"(b) In case the general assembly, as to a law not of the character hereinbefore specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days hereinbefore mentioned, said law shall take effect on the date thus fixed by the general assembly.

"(c) Laws not of the nature hereinbefore specified enacted by the general assembly at its regular session in 1939 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1939 and each ten-year period thereafter, shall take effect on the first day of November in the year of their enactment or authorization: Provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding court shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

At first glance it might appear that the constitutional amendment above quoted provides that the laws are to become effective after ninety days from the date of enactment and approval thereof. However, after careful examination thereof, it will be noted that said law is negative in character providing that "no law passed by the General Assembly * * * * shall take effect or go into force until * * * *."

If the law makers had intended said act to be affirmative in character it would have been simple to have it read "All laws passed by the General Assembly * * * * shall take effect or go into effect ninety days after enactment and approval thereof * * * *"

It is true that Section 659, supra, is somewhat of a repetition of Section 36, of the Constitution as it existed prior to the adoption of the amendment wherein quoted, but if the legislature intended that said act should be repealed, it probably would have acted on said intent and repealed said statute. In fact, House Bill 652 was perfected in the house during the 62nd General Assembly but failed to be enacted, which bill purposed to repeal said Section 659, and to enact a new Section in lieu thereof. This fact indicates that the present force and effect of said Section 659 was known to the Legislature.

It was held in the case of *Reed v. Goldneck*, 112 Mo. App. 310, 86 S. W. 1104, that it must be presumed that the Legislature knows the existing law.

It has been repeatedly held that laws are presumed to be drafted with knowledge of all existing laws on the subject. *Sikes v. St. Louis and S. F. R. Co.*, 127 Mo. App. 326, 105 S. W. 700. *State ex rel. Case v. Wilson* 151 Mo. App. 723, 132 S. W. 625.

In construing a statute, all statutes applicable to the same subject involved must be read and construed together and, if possible, harmonized. *State v. Naylor* 328 Mo. 335, 40 S. W. (2d) 1079.

When statutes appear to be in conflict they must be harmonized if possible, according to legislative intent. *Cotes & Hopkins Realty Co. v. Kansas City Terminal Ry. Co.* 328 Mo. 1118, 43 S. W. (2d) 817.

In construing statutes in *pari materia*, endeavor should be made, by tracing history of legislation on subject, to ascertain uniform and consistent purpose of Legislature, or to discover how policy of Legislature with reference to subject-matter has been changed or modified from time to time. *State ex rel. and to Use of Geo. B. Peck Co. v. Brown*, 105 S. W. 2d 909, 340 Mo. 1189.

In construing statutes in *pari materia*, not only acts passed at same session of Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed, may be considered. *State ex rel. and to Use of Geo. B. Peck Co. v. Brown*, 105 S. W. 2d 909, 340 Mo. 1189.

It is not difficult to harmonize Section 36 of the Constitution as amended and Section 659 R. S. Mo. 1939. Said Section 36 of the Constitution as amended would allow all bills to take effect or go into force ninety days from the date of enactment and approval, if there were no statutory provision setting the effective time at a later date, namely: ninety days after the adjournment of the session at which enacted.

The effect of a change in terms of court on any return or other process priviously issued is specifically provided for in Section 2036 R. S. Mo. 1939, which section is as follows:

"When any writ or other process is made returnable to any stated term of any court of record, and the legislature shall change the time of holding such term, such process shall be returned to the first term of the court held in pursuance of such change, and with the same effect as if returned at the time named in such process."

The court may continue with the November term if said term is begun before the effective date of the act changing terms. The law is so stated in 15 C. J., p. 880, par. 229 as follows:

"An act which merely changes the time of holding a certain court does not abolish such court or effect a discontinuance of business therein pending, and a court which has convened prior to the passage of such an act is not prevented from concluding its session."

CONCLUSION

It is, therefore, the opinion of this department that House Bill 509, referred to in your letter, will not take effect or go into force until ninety days after the adjournment of the session of the Legislature in which it was enacted.

This department is of the further opinion that the November term, 1943, of the said Circuit Court can be held

August 19, 1943

if the term begins before the period of ninety days after adjournment of the 62nd General Assembly has expired. If the act changing terms of court becomes effective during the term of court it will not prevent the conclusion of business in that particular term.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LAP:jc

PROBATE JUDGES:

Senate Bill No. 4 does not invalidly increase or decrease pay; how clerk is compensated; when monthly account may be made.

August 25, 1943

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of August 11, 1943, as follows:

"House Committee Substitute for Senate Bill No. 4 affecting the compensation of Probate Judges in counties with a population of less than 19,000 was signed by the Governor on August 5th, 1943. Does this act increase or decrease the compensation of Probate Judges, during their term, in violation of Section 8, Article 14 and Section 33, Article 6 of the Constitution?

"Under the provisions of this bill, the Probate Judges in these counties are required to turn over to the County Treasurer, each month, all fees collected in his office, and the county will issue to the Probate Judge a warrant in the amount of salary due him as established by this bill, at the end of the year adjustments are to be made between the total amount of fees turned over and the salary received. After this bill becomes effective what will be the condition of the Probate Clerks and their salary? Will the Clerks salary be payable out of fees collected, or will it be payable out of the monthly allowance made to the Probate Judge? Since the bill provides that all fees shall be paid into the Treasury, could the Clerk, in lieu

of that provision, be paid from such fees?

"Under this bill, is the Probate Judge required to submit to the County Court on the first day of each month an itemized list of the fees that are turned to the County Treasurer?"

House Committee Substitute for Senate Bill No. 4, (hereafter referred to as merely Senate Bill No. 4), approved by the Governor, August 5, 1943, is as follows: (Section 13404 A Laws 1943 page 86F)

"The Judges of the Probate Courts in counties which now have or may hereafter have a population of less than 19,000 inhabitants shall receive for their services annually, to be paid out of the County Treasury in equal monthly installments at the end of each month by a warrant drawn by the County Court upon the County Treasury minimum salaries as follows: In counties having 10,000 inhabitants or less, the sum of \$750.00; in counties having 10,000 inhabitants and less than 15,000, the sum of \$1200.00; in counties having more than 15,000 inhabitants and less than 17,500, the sum of \$2,000.00; and in counties having more than 17,500 inhabitants and less than 19,000, the sum of \$2,400.00; but should the yearly sum of fees earned and collected by any Probate Judge of any such county, and his clerk or clerks, by virtue of the office, exceed the amount which such Judge would be entitled to receive by reason of the population of said county as aforesaid, then such judge shall be entitled to retain the excess subject to the limitations set out in Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri, 1939, and the County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees. It is further provided that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk dur-

ing the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided, taking duplicate receipts therefor, one of which shall be filed with the County Clerk, and every such Probate Judge shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County Treasury as herein provided."

The two constitutional provisions which it is thought that this bill might violate are Section 8, Article 14 providing:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; * * * "

and Section 33, Article 6, providing:

"The judges of * * * all * * * courts of record receiving a salary, shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

It will be noticed that Senate Bill No. 4 fixes a "minimum salary" for probate judges in all counties having a population of less than 19,000 inhabitants. The minimum is adjusted on a population classification and ranges from \$2,400.00 to \$750.00 according to the population class into which the county falls. The bill also provides that where the judge's annual fees collected exceed the minimum annual salary, he is entitled to receive said excess "subject to the limitations set out in

August 25, 1943.

Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri 1939". This limitation, of course, has reference to the maximum compensation which a probate judge may receive.

The maximum compensation of a probate judge under Section 13404, after deducting from his fees a reasonable amount for clerk hire, is the same that is paid to the judge of the circuit court, having jurisdiction in said county, for his services as judge of the circuit court, judge of the juvenile court, jury commissioner, and from change of venue fees (*State ex rel. and to Use of Jasper Co. v. Gass*, 296 S. W. 431; *Smith v. Pettis County*, 136 S. W. (2d) 282). Thus, a probate judge's maximum compensation varies from county to county depending on the character of the judicial circuit and the volume of change of venue business in the circuit. However, in all circuits, the annual compensation of the circuit judge will exceed the sum of \$2,400.00, which is the greatest minimum pay fixed for a probate judge under Senate Bill No. 4.

Senate Bill No. 4 does not increase the maximum pay allowed to a probate judge, but only fixes a minimum below which his compensation shall not fall. Section 8, Article 14 of the Constitution has no application to this character of change in a salary or compensation. It is designed to prohibit a change that would increase the maximum compensation allowed to a probate judge under Section 13404. Such was the holding in *State ex rel. Emmons v. Farmer*, 271 Mo. 306. That case involved a change in the compensation of a circuit clerk. At the time the clerk was elected, the law provided he was to receive his compensation by retaining fees, but not to exceed \$2,000.00 a year. Thereafter, and during the term for which he was elected, the law was changed to provide the clerk with a flat annual salary of \$2,000.00 without regard to the amount of fees collected and paid into the treasury. It was contended that since, prior to the change in the law, the clerk had never actually collected in a year the sum of \$2,000.00 in fees, that therefore to give him a flat salary of \$2,000.00 a year was increasing his compensation during his term contrary to Section 8 of Article 14. The court held that such was not an increase prohibited by the Constitution, saying (1. c. 317):

"We have seen that the amounts (of the maximum fees and the flat salary) are the same * * * and conclude that * * * there has been no increase and the Act is constitutional.* * *" (Parentheses out).

August 25, 1943.

It therefore clearly appears that the court was of the view that in order for the change to have brought about an invalid increase, the flat salary fixed must be in excess of the maximum fees theretofore permitted to be retained.

This same reasoning disposes of any contention that Senate Bill No. 4 violates Section 33, Article 6 of the Constitution. As pointed out above, there has been no increase in the maximum compensation, but rather it remains just as it has always been under Section 13404. Since it is the same as it has always been, there is no invalid increase or decrease such as is prohibited by Section 33 of Article 6.

It therefore is our opinion that Senate Bill No. 4 is valid and takes effect at the time fixed in Section 659, R.S. Missouri 1939.

II.

The next question involves the method by which the probate judge is to compensate his clerk where the judge draws the minimum monthly salary provided in Senate Bill No. 4.

The probate judge under Section 2440, R. S. Missouri 1939, is authorized to appoint a clerk "who shall be paid by said judge". Thus, said clerk is to be paid by the judge out of his (the judge's) compensation which he receives as probate judge. However, in a way, provision is made to allow the judge the expense of his clerk. The way this is done is that where a judge collects fees in one year, in excess of the maximum he may personally retain under Section 13404, he is permitted to retain a further sum, in addition to said maximum, to cover "all reasonable and necessary expenses for clerk hire" (Section 13404).

Under Senate Bill No. 4 probate judges who draw the minimum monthly salary "shall at the end of each and every month * * * make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, (except marriage and inheritance tax fees) * * * and that he shall at the end of each month pay over to the County Treasurer all monies collected by him or his clerk

August 25, 1943.

during the month which are required to be shown in the monthly report * * * * *. (underscoring ours). It thus appears the judge will not have access to the fee, as earned, to pay his clerk. They must be turned over to the treasurer monthly. All the court will have is his monthly minimum salary and since the clerk "shall be paid by the judge" the judge will have to pay the clerk out of the amount he receives as a minimum salary.

However, should the yearly fees earned and collected by the judge and his clerk exceed the minimum yearly salary he is paid under Senate Bill No. 4, then the judge is entitled to have a warrant on the county treasury for all of such excess where the excess sum, together with the minimum salary drawn, does not exceed the amount paid to the circuit judge, as specified in part one of this opinion, together with an additional sum to "cover all reasonable and necessary expenses for clerk hire".

It therefore is our ^{my} opinion that the compensation which the probate judge pays to his clerk cannot be paid out of the fees earned since all of said fees must monthly be paid into the county treasury. The probate judge will have to pay his clerk out of his minimum monthly salary.

III.

This question concerns when the probate judge is required to make his monthly accounting of fees and to pay over the fees collected to the county treasury. Senate Bill No. 4 requires the report to be made and filed at the "end of each and every month". It also requires the fees collected to be paid over at the "end of each month".

These references are merely to the end of a certain period, designate as a month. Section 655, R. S. Missouri 1939, lays down certain rules for construction of statutes and provides: "the word 'month' shall mean a calendar month." A calendar month is not at end until midnight of the last day of the month and if the language of Senate Bill No. 4 were taken literally, then this report must be filed and the fees collected paid over at midnight of the last day of the month. However, statutes must be applied with reason and such application would

Hon. Forrest Smith

-7-

August 25, 1943.

not be reasonable. Therefore, we think filing the report and paying the fees as soon after the close of the month as is possible is all that is required. The soonest possible date after the close of the month that such could be done would be the first day of the succeeding month.

It is therefore our opinion a probate judge may file his monthly reports of fees and pay over to the county treasurer the fees collected on the first day of the month following the month for which he must account.

Respectfully Submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

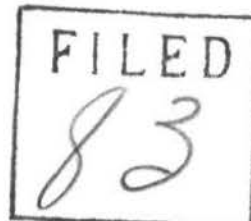
LLB:jn

INCOME TAX: Members of the military or naval forces do not have ~~to~~ make income tax returns, nor pay income taxes--civil officer--not being a prisoner of war or detained by any foreign government liable.

September 14, 1943

10/5

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Mr. Smith:

This will acknowledge receipt of your request, dated September 9, 1943, for an official opinion from this office, which request is as follows:

"I am herewith submitting two questions which are in connection with House Bill No. 630 which was passed by the 62nd General Assembly and duly signed by the Governor.

"I will thank you to give me your written opinion as to whether or not the two classes of individuals mentioned in questions (1) and (2) below, would be required to file a State of Missouri Income Tax Return, and pay the tax as provided under Sections 11354 and 11357 Revised Statutes of Missouri, 1939.

"(1) Any Civilian officer or employee of any department who, at the time any such Return or payment which would otherwise become due, who is not a prisoner of war and who is not otherwise detained by any foreign government with which the United States is at war.

"(2) Any individual in the military or naval forces of the United States, who is not serving on sea duty and is not outside the continental United States at the time any such Return or payment would otherwise become due.

"Please let us have your opinion at your earliest convenience."

In answer to your first question, clause "B" of

of section 1, of House Bill 630, reads as follows:

"any civilian officer or employee of any department who, at the time any such return or payment would otherwise become due, is a prisoner of war or is otherwise detained by any foreign government with which the United States is at war, or "***

It is the opinion of this office, that since the bill specifically provides that any civilian officer or employee of any department, who at the time a tax would become due, is a prisoner of war or is otherwise detained by any foreign government with which the United States is at war, but does not include such an officer, who does not qualify as above, then any such civil officer would be liable to make the return and pay his tax as provided by the Statutes of Missouri.

In answer to your second question, clause "A" of House Bill No. 630, reads as follows:

" any individual in the military or naval forces of the United States, or "***

Section 2 of the Bill defines what is meant by, "individual or member of the military forces of the United States." Such section is as follows:

"For the purpose of this Act the term 'continental United States' means the states and the District of Columbia, and the term 'individual' or 'member' of the military forces of the United States means any person in the Army of the United States, United States Navy, the Marine Corps, The Army or Navy Corps (Female), the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service."

Sept. 14, 1943

C O N C L U S I O N .

It is the opinion of this office that any individual in the military or naval forces of the United States, regardless of where he is stationed, or what he is doing, is not required to prepare a return or pay an income tax as provided under sections 11354 and 11357, R. S. Missouri, 1939, until (1) the fifteenth day of the third month following the month in which he ceases (except by reason of death or incompetency) to be a prisoner of war, or to be detained by any foreign government with which the United States is at war, or to be a member of the military or naval forces of the United States serving on sea duty or outside the continental United States, as the case may be, unless prior to the expiration of such fifteenth day he again is a prisoner of war, or is detained by any foreign government with which the United States is at war, or is a member of the military or naval forces of the United States serving on sea duty or outside the continental United States; (2) the fifteenth day of the third month following the month in which the present war with Germany, Italy and Japan is terminated, as proclaimed by the President; or (3) the fifteenth day of the third month following the month in which an executor, administrator, or conservator of the estate of the taxpayer is appointed.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

GW:LeC

APPROVED:

ROY MCKITTRICK
Attorney General

STATE AUDITOR: May not draw one warrant covering expenditure
WARRANTS: of three institutions from six different appropriations.

September 18, 1943

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter of August 25, 1943, as follows:

"I am enclosing a list of properties owned by the State of Missouri under control of the Penal Board of Jefferson City showing the amount of fire insurance and the premiums on the various properties listed.

"The total insurance premiums on the properties at Tipton, Mo., Farm No. 2, Algoa Farm and the Church Farm amount to \$8,433.55.

"Upon an appropriation made by the last legislature to the Penal Board and your opinion which was given to Senator Falzone as of June 18, 1943, I will appreciate an opinion from you as to whether I should issue a warrant in the amount of this blanket premium for the fire insurance on the buildings as outlined in the schedule I am enclosing."

The attached schedule shows the location and description of the buildings to be insured; the amount of coverage on each building and the premium.

The opinion to Hon. Joseph A. Falzone of June 18, 1943, has no bearing on the instant question since all it passed upon was whether appropriations could be expended for insurance premiums.

September 18, 1943.

It appears from your letter and the attached schedule that the property insured is at four general locations. Since you refer to the same as being property under control of the Penal Board, the property at Tipton, Missouri, must be that used in connection with the Industrial Home for Negro Girls, and the others are the Intermediate Reformatory for Young Men at Algoa; and Prison Farm No. 2 and Church Farm which are a part of the penitentiary proper.

House Bill 411 of the 62nd General Assembly approved July 26, 1943 provides the funds to operate the penal institutions for 1943-1944. Section 1 thereof provides the funds that are involved in this question. Under the heading "For the Missouri Penitentiary, payable out of General Revenue: * * * * D. Operations" there is appropriated \$1,200,000. and one of the objects specified for which the funds may be expended is "insurance". Under the heading "For the Missouri Penitentiary, payable out of Earnings Fund: * * * * D. Operations" there is appropriated \$600,000. and one of the objects specified for which the funds may be expended is "insurance". Under the heading "For Intermediate Reformatory, payable out of General Revenue fund * * * * D. Operations" there is appropriated \$231,000. and one of the objects specified for which the funds may be expended is "insurance". Under the heading "For Intermediate Reformatory, payable out of Earnings Fund * * * * D. Operations" there is appropriated \$20,000. and one of the objects specified for which the funds may be expended is "insurance". Under the heading "For the Industrial Home for Negro Girls, payable out of General Revenue fund * * * * D. Operations" there is appropriated \$15,000. and one of the objects specified for which the funds may be expended is "insurance". Under the heading "For the Industrial Home for Negro Girls, payable out of Industrial Home for Negro Girls Fund * * * * D. Operations" there is appropriated \$26,000. and one of the objects specified for which the funds may be expended is "insurance".

It appears from the foregoing resume of Section 1 of House Bill 411 that there are two distinct appropriations for insurance for each of the three institutions involved, and each of the six constitute distinct and separate appropriations. And there is no doubt that each institution's appropriation must bear the charge for insuring that institution's buildings. Insurance for the Penitentiary property certainly cannot be paid out of funds appropriated for insurance at the Algoa Reformatory.

Section 13026, R. S. Mo. 1939, fixes the general duties of the Auditor as follows:

September 18, 1943.

"He shall: * * * * third, express in the body of every warrant which he may draw upon the treasury the particular fund, appropriated by law, out of which the same is to be paid: * * * *"

Section 13042, R. S. Mo. 1939, prescribes the form of the Auditor's warrants and that form, if properly executed, will be in compliance with Section 13026 as above quoted.

In view of these requirements we do not see how the Auditor can draw one warrant for \$8,443.55, covering accounts chargeable against six different appropriations for three different institutions, and yet have properly expressed in the body of the warrant the "particular fund appropriated by law, out of which the same is to be paid". He would have to designate the six different funds and the amount chargeable to each. However, we think the purpose of Section 13026 was to require a separate warrant for each institution, and where such institution has two appropriations for the same purpose and the expenditure is to be charged partially against each of the funds, that separate warrants must be drawn on each fund. In other words, if the penitentiary proper, in expending funds for the insurance of its buildings at Farm No. 2 and Church Farm, draws against both the General Revenue and Earnings appropriations, a separate warrant must be drawn on each fund for that portion of the expenditure charged to said fund.

We do not mean to convey the impression, however, that the cost of insurance on each separate building at each institution must be covered by a separate warrant. All we conclude is that the cost of "insurance" at a single institution cannot be paid by a single warrant which may be chargeable to two appropriations.

CONCLUSION

It therefore is our opinion a single warrant may not be drawn by the Auditor to cover expenditures for three different institutions chargeable against six different appropriations.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

ROY McKittrick
Attorney General

L.L.B. in

BURIAL SOCIETIES: Person regularly receiving and transmitting assessments to foreign burial association unlawfully acts as agent.

September 24, 1943

7/28



Hon. Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

Under date of September 17, 1943, you wrote this office requesting an opinion as follows:

"I would like your opinion on the following: a Burial Association of Oklahoma has written a number of contracts with people residing in Oklahoma but who live near Seneca in this county and within the Seneca trade territory. It is more convenient that they pay their assessments to an agent of the Association who lives at Seneca. Does the fact that these members of the Association pay their assessments to an agent of the Association residing in Missouri constitute a violation of our statutes? These contracts are written in Oklahoma and the agent residing in Seneca does not write contracts but merely collects the assessments."

In your letter you make no statement of facts concerning the plan of operation for the Oklahoma Burial Association and it is assumed that such burial association operates upon a plan similar to that held to be doing an insurance business in the case of State ex inf. Williamson v. Black, 145 S. W. (2d) 406, and in which case the statute under which

numerous burial associations had been organized in this State, was held to be unconstitutional and void. This opinion is written, based upon that assumption.

Your attention is directed to Section 6018, Article 10, Chapter 37, R. S. Mo. 1939, which is in part as follows:

"Any person or persons in this state who shall receipt for any money on account of or for any contract of insurance made by him or them for any insurance company or association not at the time authorized to do business in this state, or who shall receive or receipt for any money from other persons, to be transmitted to any such insurance company or association, either in or out of this state, for a policy or policies of insurance issued by such company or association, or for any renewal thereof, although the same may not be required by him or them as agents, or who shall make or cause to be made, directly or indirectly, any contract of insurance for such company or association, shall be deemed to all intents and purposes an agent of such company or association, and shall be subject to all the provisions and regulations and liable to all the penalties provided and fixed by this chapter. * * *

And also to Section 6019 of the same article and chapter, as follows:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance department of this state the certificate

authorizing him to act as such agent or solicitor, as required by section 6003 of the Revised Statutes of this state, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in insurance business, before such individual, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance department of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment." (Underscoring ours.)

Conclusion.

A person collecting assessments in this State and remitting them as a regular course of procedure to a burial association not licensed to do business in the State of Missouri, would be violating the statutes set out above.

Respectfully submitted,

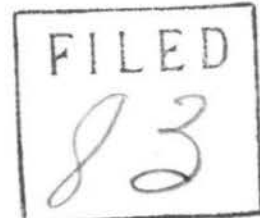
W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

PROBATE JUDGES: Under House Committee Substitute for Senate Bill No. 4, Probate Judges may at any time collect excess fees above their salary after they have paid fees into the county treasury equal to the amount of their annual salary.

October 25, 1943



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: W. A. Holloway,
Chief Clerk

Dear Mr. Smith:

The Attorney-General wishes to acknowledge receipt of your letter of October 18th in which you request an opinion of this department. This opinion request, omitting caption and signature, is as follows:

"At the recent meeting of the Probate Judges Association of Missouri the Judges in their convention requested us to obtain an opinion from your office on the question concerning the method and time of the Probate Judges retaining fees collected by them in excess of the annual compensation allowed under the provisions of House Committee Substitute for Senate Bill No. 4.

"To clarify the question, we will use as an example a Judge in the last bracket, in a County with a population of more than 17,500 and less than 19,000, wherein his annual salary paid by the County would be \$2400.00, then the law provides that if the yearly sum of fees earned and collected by virtue of the office shall exceed the amount which the Judge would be entitled to receive under his salary, 'then such Judge shall be entitled to retain the excess subject to the limitations set out in Section 13404, R. S. Missouri, 1939, and the

Oct. 25, 1943

County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees.' The question involved is, 'can the County Court begin to draw a warrant to the Probate Judge for fees turned in to the County just as soon as the amount turned in exceeds the salary limitation, or will it be necessary for the Judge to wait until the end of the year.' The Judges feel that the language used in the law, 'such Judge shall be entitled to retain' and 'the County Court shall draw a warrant or warrants', would indicate that as soon as the excess collections begin to come into the Treasury that the County would then draw them one warrant for their regular monthly compensation and another warrant to return to them the excess fees.

"We would like your opinion on this matter as there are to be furnished the Judges in these counties other matters, and we would like to enclose this opinion at that time."

Since this request is based upon a construction of House Committee Substitute for Senate Bill No. 4, we first wish to cite such legislation, which was approved by the Governor on August 5, 1943. The bill provides as follows:

"The Judges of the Probate Courts in counties which now have or may hereafter have a population of less than 19,000 inhabitants shall receive for their services annually, to be paid out of the County Treasury in equal monthly installments at the end of each month by a warrant drawn by the County Court upon the County Treasury minimum salaries as follows: In counties having 10,000 inhabitants or less, the sum of \$750.00; in counties having 10,000 inhabitants and less than 15,000, the sum of \$1200.00; in counties having more

than 15,000 inhabitants and less than 17,500, the sum of \$2,000.00; and in counties having more than 17,500 inhabitants and less than 19,000, the sum of \$2,400.00; but should the yearly sum of fees earned and collected by any Probate Judge of any such county, and his clerk or clerks, by virtue of the office, exceed the amount which such Judge would be entitled to receive by reason of the population of said county as aforesaid, then such judge shall be entitled to retain the excess subject to the limitations set out in Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri, 1939, and the County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees. It is further provided that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided, taking duplicate receipts therefor, one of which shall be filed with the County Clerk, and every such Probate Judge shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County Treasury as herein provided."

Your request necessarily calls to our attention the exact amount which a Probate Judge may collect for his services. It will be noted that the Judge has authority, under the above statute, to retain the excess fees which he collects "subject

Oct. 25, 1943

to the limitations set out in Section 13404 of Article 2, Chapter 99, R. S. Mo., 1939." The limitation spoken of should be called to your attention. So, consequently, we wish to cite you that part of Section 13404, supra, which relates to the compensation of the Judges. This is as follows:

"* * * Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, * * *"

After a study of the above statute in conjunction with the instant bill, it would appear that a Probate Judge is entitled to his salary plus any additional fees in excess of the amount necessary to offset the amount of his salary, with the limitation placed on such excess that it shall not exceed the salary of the Circuit Judge of his county.

With this in view, we will now proceed to the principal question, i. e., when the Probate Judge may collect such additional fees. There are three constructions which ought to be suggested in answer to the question. These are, (1) at the end of each month, (2) at such time as the Probate Judge has paid into the treasury an amount of fees equal to his salary, or (3) at the end of the year. Before discussing these three ideas, we would like to offer our view on the question as to whether the salary of the Probate Judge is to be computed on an annual or on a monthly basis. It will be noted that the instant legislation provides that the Probate Judges "shall receive for their services annually * * *." This, we feel, justifies us in saying that these salaries are figured on an annual basis even though the bill provides that they are to be paid in twelve "equal monthly installments." It is our opinion that the latter provision was incorporated in the legislation merely as a convenience to the officers in allowing

them to be paid monthly. See State ex rel. Harvey v. Linville et al., 300 S. W. 1066, 318 Mo. 698. This observation leads us to the conclusion that where the bill provides that if fees exceed the amount of a Probate Judge's salary, it means his annual, instead of his monthly salary.

Now, taking the first view as set out in the preceding paragraph, we wish to offer an example to explain our construction of this statute. Let us say that a Probate Judge is entitled, under a population classification, to \$2400.00 per year as salary - under the provisions of the instant bill, he shall be paid the sum of \$200.00 per month or one-twelfth his annual salary. Suppose, in January he collects fees in the sum of \$250.00, which, of course, is \$50.00 in excess of his monthly installment or salary. Then, can we say that at the end of that month he is entitled to that \$50.00? We think not. If his salary was figured on a monthly basis, he would be entitled to this excess, but where it is figured annually he would not. It would be possible that after January he might not collect more than an average of \$100.00 per month in fees, or a total of \$1,100.00. Should he have been paid the \$50.00 excess in January, then he would at the end of the year have drawn \$2450.00 - \$50.00 plus his fixed salary - when, in fact, he would have collected only \$1,350.00, or less than his fixed salary. Under the provisions of this bill we do not feel he could collect the excess of fees over his monthly salary installment.

We now will consider classification two aforesaid, which would permit a probate judge to draw fees which exceed his yearly salary after he has deposited in the county treasury an amount equal to his salary. Using the same example as above, can a Probate Judge, after earning, collecting and depositing with the County Treasurer \$2,400.00 in fees, which is the amount equal to his yearly salary, make a demand and collect an amount equal to the excess fees over the \$2400.00? We believe that he can. It appears that this statute tries to assure the counties that when fees are collected by a Probate Judge, they will be paid into the treasury in an amount equal to the judge's salary. After such condition has been met, any other fees deposited are the property of the Probate Judge, up to the limitation discussed supra. Since these fees are the property of the Probate Judge, we feel that he should be allowed to draw these amounts whenever he has fulfilled the condition mentioned above.

These views necessarily bring us to the third classification above, i. e., as to the Probate Judge being compelled to wait until the end of the year before he is entitled to draw such excess fees. It seems to us that since these fees are his, up to the maximum amount set out in the statutes, there would be no reason why he should be forced to wait until the end of the year to collect them. The County Court has sufficient records to inform it as to the amount that has been collected and deposited, so that, in case the fees exceed the maximum amount, it can claim such fees on the part of the county. The means of keeping these records is provided in this bill when provision is made for the filing of monthly reports by the Probate Judge.

The purpose of statutory construction is to determine legislative intent. See *Thompson v. City of Lamar*, 17 S. W. (2d) 960, 322 Mo. 514; *State v. Toombs*, 25 S. W. (2d) 101, 324 Mo. 819; *State ex rel. American Asphalt Corp., v. Trimble*, 44 S. W. (2d) 1103, 329 Mo. 495. In construing the instant statute we have attempted to arrive at what we feel is the legislative intent. It has also been held that a statute should not be construed so as to make it unreasonable, where there can be a reasonable construction. See *State ex rel. Public Service Company of St. Louis v. Public Service Commission*, 34 S. W. 486, 326 Mo. 1169. Further, the courts have held that a statute will not be so construed as to require an impossibility or lead to absurd results if susceptible of reasonable interpretation. *State v. Irvine*, 72 S. W. (2d) 96, 335 Mo. 261, 93 A. L. R. 232.

Following the rules of construction above, we feel that we have adopted the only reasonable construction of this bill in holding that a Probate Judge may make demand and be entitled to all excess fees collected by him at any time after sufficient fees have been deposited in the treasury by him to offset the amount of his salary for that year, and that he shall not be compelled to wait until the end of the year to collect such excess fees, if any. In adopting such reasonable construction, it would appear that we have arrived at the intention of the Legislature.

We further think it proper to call attention to the fact that this instant legislation should go into effect ninety days after the adjournment of the Legislature, which would be November 21, 1943. But since that date falls on a Sunday, the effective day is set over one day, that is, until November 22,

Oct. 25, 1943

1943. As a result thereof, there will be a short period of time between such date and December 31, 1943, when the Probate Judges can take advantage of this bill. However, due to the fact that the counties have not set up any provision in 1943 in their budgets for the payment of these salaries, it might result in the failure of the Judges to collect such remuneration, unless there is a surplus in the proper classification. This office has recently rendered an opinion to the effect that if there is a surplus in the anticipated revenue for the year of 1943, over and above all necessary charges, a warrant for such unpaid salary (Probate Judge's) may be issued payable out of Class 4, 5 or 6, if such surplus exists in either of these classes; or unclaimed balances in Classes 1, 2 and 3 may be transferred to Class 5 to pay same.

Conclusion

Therefore, it is the opinion of this department that, after sufficient fees have been earned and collected and deposited in the treasury by the Probate Judges to offset the amount of their annual salary, the Probate Judges are then entitled to any excess fees over and above such amount, up to limitation as set on the salary by Section 13404, R. S. Mo. 1939, set out above. And they shall be entitled to demand and collect such fees at any time after the amount equal to their salary has been paid in. This opinion, of course, is limited to the construction of House Committee Substitute for Senate Bill No. 4 and the classes of counties named therein.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

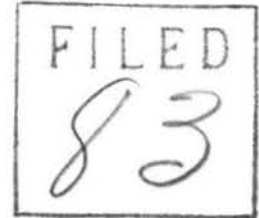
ROY McKITTRICK
Attorney-General

JSP:EG

SCHOOLS: Free transportation of pupils in a consolidated School District may be determined - 1. When Board deems it advisable. 2. When approved, at election, by 2/3 voters who are taxpayers. Board's discretion in formulating needful rules will prevail in either case. Non-resident pupils may be admitted to District and may be transported same as pupils within District.

November 1, 1943

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri



Dear Mr. Slankard:

This is to acknowledge receipt of your letter of October 23 in which you request an opinion of this department. Your letter is as follows:

"I will appreciate very much your opinion on the following:

"The Board of Directors of a consolidated district have refused to route a school bus nearer than a mile from some of the pupils. Is the Board required under the law to furnish transportation within any certain distance of the pupils' homes? These pupils are residents of the district and while the Board has refused to come nearer than a mile to their home, at the same time it sends the school busses outside the district to pick up non-resident pupils."

In making provisions for the free transportation of pupils within the state, the obvious intent of the legislature was to make it possible for all the children within the state to have an education. In order to encourage attendance upon schools, particularly rural schools, the legislature has passed numerous sections of our statutes which are devoted exclusively to the matter of transportation. In so doing, the lawmakers have sought to anticipate every situation with which the pupils, parents, patrons and School Board might be confronted when they attempt to make schools more accessible to the pupils.

While the number of statutes so designated is relatively small, the questions raised are innumerable. These statutes are most generally misunderstood and are fruitful sources of misunderstanding and controversy. It would seem from the questions raised in your opinion request that the following Sections will apply: Section 10326, 10496, 10327, and 10340. We shall try to dispose of them in the order named.

The first of these Sections involving free transportation of pupils, Section 10326, R. S. Mo. 1939, reads as follows:

"Free transportation of pupils--how obtained--by whom paid.--Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in Section 10361. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the

November 1, 1943

incidental fund of the district: Provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

As we read this portion of our statutes, the transportation of pupils living more than $\frac{1}{2}$ mile from school, at the expense of the district, may be made possible in either of two ways: (1) when the board deems transportation advisable; and (2) when requested by petition by ten or more taxpayers and subsequently voted on at either a regular or special election and approved by $\frac{2}{3}$ of the voters, who are taxpayers. Then in either case the board shall arrange for transportation. They have the authority to make all needful rules and regulations for free transportation. The board is given considerable latitude at this point and it would appear that in the exercise of their discretion they may do so without interference.

Our statutes at Section 10326, R. S. Mo. 1939, state, you will note, with respect to the distance the children are to be transported to school, "All children living more than $\frac{1}{2}$ mile may in the discretion of the board be transported." By implication we might gather that those living closer than $\frac{1}{2}$ mile should walk. However, we point out what the legislature has said, and we presume they meant just what appears printed in the section.

When the situation involves a consolidated district, this section further states that the board is not required to maintain a school within $3\frac{1}{2}$ miles of the pupils' home. Where transportation is made available the distance from home to school may exceed $3\frac{1}{2}$ miles. The location of a school site in a consolidated district is within the discretion of the School Board. Whitehead v. Wenom, 32 S.W. (2d) 59, 326 Mo. 352.

Since your inquiry does not concern itself with matters of procedure in voting on the transportation question within the district or State aid where a transportation system has been inaugurated, we do no more than cite two sections for your consideration. Because of their extreme length we do no more than bring them to your attention. They are as follows:

Section 10496, R. S. 1939 - Transportation may be voted on.
Section 10327, R. S. 1939 - State aid available.

At this point we direct your attention to a portion of a decision in State ex rel. Gastineau v. Smith, 196 S. W. 115:

" * * * * * On reading the act of the Legislature it is clear that, if a vote is taken - and one was taken in this instance - to transport children who live farther than $2\frac{1}{2}$ miles from a schoolhouse in the district, the transportation must include all children within the district falling within the class, and does not contemplate that the directors may use the incidental funds of the entire district to transport certain children in the district living more than $2\frac{1}{2}$ miles from a schoolhouse and not transport other children in the district living more than $2\frac{1}{2}$ miles from a schoolhouse. In other words, the act does not contemplate that a majority of the voters in the district or the school directors will be permitted to discriminate against certain children or certain parts of the district. The whole district is taxed to create an incidental fund, and if used at all for transportation it must be used without partiality or discrimination. As above stated, the school directors were transporting certain children out of the incidental fund under authority of a vote which was taken and the transportation of children was adopted in the district. It thereupon became the duty of the directors to transport all the children in the district falling without the $2\frac{1}{2}$ mile line irrespective of their particular location * * * * *."

See also a portion of the opinion as given in State ex rel. Jungmeyer v. Hunter, 200 S.W. 300, par. 2:

"Under Laws 1913, pp. 721, 723, Sec. 4, providing that if transportation is not provided for in any consolidated school district, it shall be the duty of the board of directors to maintain an elementary school 'within two and one-half miles by the nearest traveled road of the home of every child of school age within said school district,' where relator's children, after passing through the fields adjoining their home, as they had to to reach the highway, were less than $2\frac{1}{2}$ miles from school, the act was complied with, it not requiring that the schoolhouse be within $2\frac{1}{2}$

November 1, 1943

miles of the child's home, but only that it shall not be more than that distance from the point where access to the road is had."

Turning now to the admission of non-residents to a school we find in that portion of Section 10340, Mo. R. S. 1939, useful for our purpose this language:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district * * * * * and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same, except as provided for in Section 10458, R. S. 1939 * * * * *."

CONCLUSION

From our reading of the statutes as they apply to the free transportation of pupils and the decisions of the courts as they appear, we therefore conclude as follows:

That free transportation of pupils in a consolidated district more than $\frac{1}{2}$ mile from school may be inaugurated: (1) when the board deems it advisable; and (2) when approved by $\frac{2}{3}$ of voters in the district, who are taxpayers, at a regular or special election for that purpose.

That the board of the consolidated district shall arrange transportation and make all needful rules and regulations governing same. In so doing the board is given considerable latitude and unless there is a gross abuse of this discretion, their judgment in this situation must prevail. And further, the board may admit pupils not residents in the district, and they may prescribe the tuition fee to be paid by such non-residents.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

LIM:ml

STATE BOARD OF BARBER EXAMINERS:
LICENSE:

Answers to three questions
regarding the revoking and re-
issuing of barbers' licenses.
Term "revoke" defined.

December 9, 1943

FILED

83

Mr. Harry G. Sloan, President
State Board of Barber Examiners
4617 Troost Avenue
Kansas City, Missouri

Dear Mr. Sloan:

We are in receipt of your request for an opinion
of recent date, which request reads as follows:

I respectfully submit herewith a question
which will be helpful to our board in re-
gard to the construction of Section 10137,
Revised Statutes of Missouri, 1939. The
particular question is this:

"After the State Board of Barber Examiners
has held a hearing in regard to the revo-
cation of the license of a barber and where
proper service of the notice of the hearing
has been fully complied with, and after a
hearing the board reaches a decision revok-
ing the license of the barber, does the
board have the authority to change its de-
cision and restore the license to the
barber without an additional hearing and
introduction of evidence?

"Second, does the original decision of the
board revoking the license of the barber
become final and without power of modifica-
tion of the board until the expiration of
the ninety days at which time the statute
provides that the person whose license has
been revoked may, after the expiration of
ninety days, apply to have the same re-
issued upon the satisfactory showing that
the disqualification has ceased?

"Third, if the board does have the power to
change or modify its decision without appli-
cation therefor and on its own motion and
without the hearing of additional evidence
within what time should such action be
taken?"

Section 10137, R. S. Mo. 1939, reads as follows:

"Said board shall have power to revoke any certificate of registration or permit granted by it under this chapter for conviction of crime, habitual drunkenness, gross incompetency, failure or refusal to properly provide or guard against contagious or infectious disease, or the spreading thereof, in the practice of the occupation aforesaid, or violation of the rules of the board mentioned in section 10128 of this chapter, or for any extortion or overcharge practiced: Provided, that before any certificate or permit mentioned in this chapter shall be so revoked, the holder thereof shall have notice, in writing, of the charge or charges against him, and shall, at the day specified in said notice, at least five days after the service thereof, be given a public hearing on said charges and full opportunity to produce testimony in his behalf and to confront the witnesses against him. Any person, firm or corporation whose certificate or permit has been so revoked may, after the expiration of ninety days, apply to have same reissued upon a satisfactory showing that the disqualification has ceased."

It will be noted from a reading of this section, supra, that any person, firm or corporation whose certificate or permit has been so revoked may, after the expiration of ninety days apply to have same reissued under a satisfactory showing that the disqualification has ceased. In considering the wording of this portion of the statute, we first call attention to the fact that the section uses the words "certificate or permit." These words are synonymous with the word license, and in Section 10,132, R. S. Mo. 1939, which section is a part of the same article containing Section 10,137, supra, we find this wording:

"* * For any and every license
or certificate given or issued
by the board * * * *"

So, we must conclude that it was intended by the legislature, through the use of the words certificate or permit, that these words be used as synonymous terms with the word license. This being true, we shall next endeavor to define the word license, as follows:

"A permit or authorization to do what without a license would be unlawful. 15 R.C.L. 247.

"To license means to confer upon a person the right to do something which otherwise he would not have the right to do.

"A license is in the nature of a special privilege, and not a right common to all. 17 R.C.L. 474."

It will further be noted that the legislature used in this section the word "revoke" and does not use the words "suspend" or "renew." It is our view that the legislature intentionally left out the words "renew" or "suspend" and intended that the word "revoke" should carry its regular and ordinary meaning. We say this for the reason that in Section 10,121, which section is contained in Chapter 66, R. S. Mo. 1939, or which we copy a portion, merely for the purpose of comparison to show that the Legislature in giving powers to other boards which are ministerial in character used the words "renew, suspend and revoke." Said section reads in part as follows:

"The state board of optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes: * * *"

Now turning to the meaning of the word "revoke" we quote from Black's Law Dictionary wherein the word is defined as follows:

"Revoke. To call back; to recall; to annul an act by calling or taking it back."

The word revoke is similarly defined in the case of Burns v. State, 76 S. W. (2d) 172, 1. c. 176, wherein the court said:

"* * * * Revoke means to 'annul by taking back.' The license was taken back to its source * * * * *"

Therefore, it is our view that it was the intention of the Legislature that Section 10,137, supra, should be construed to mean that if the Barber Board, in their discretion, exercised their rights under said section and revoked an outstanding certificate, permit or license, such certificate or permit should be permanently revoked. In this connection, we call attention to the case of State ex rel. Ball v. Board of Health, et al, 26 S. W. (2d) 773, 1. c. 777, wherein the court had this to say:

"* * * For the reason stated, we hold that it was not necessary for the record to affirmatively show that the board found relator guilty of the offense charged, as a prerequisite to the order revoking the license. Neither do we think that the order revoking the license is void because it does not state a period of time for which the license was revoked. The statute provides that the license shall be revoked for such period of time as may be agreed upon. The members of the board may agree to revoke for a limited period of time or for all time, and where, as here, the order revoking the license does not name any specified period of time, it necessarily means a permanent revocation for all time."

While it is true that the court in this case had before it a different section of the statutes, and a section which applied to a different board than the court in this opinion, it is our view that the reasoning used in that case would apply to Section 10,137, supra, and we must conclude that where a certificate or permit is revoked, such revocation must be construed to mean permanent, and we so rule on that point.

However, we point out that the section further provides that after the expiration of ninety days, the person, firm or corporation whose certificate or permit has been revoked may apply to have same reissued, upon satisfactory showing that the disqualification has ceased. By the term "reissued" we think it is clearly the intention of the Legislature that the Board, if they see fit, may reissue the certificate, permit or license which they recalled or revoked. As is pointed out in the definition, a certificate, permit or license, as used in this section and other sections contained in this article of the statutes, is in the nature of a special privilege and the Board has a right to grant such certificate, permit or license to persons who meet the qualifications as laid down by the Legislature or by the Board.

Now turning to the three questions asked in your opinion request, the first question is: "Does the Board have the authority to change its decision and restore the license to the barber without any additional hearing and introduction of evidence?" We answer this question in the negative for the reason that it will be noted that Section 10,137 places a prohibition against the person, firm or corporation whose certificate has been revoked from again applying until the expiration of ninety days. This being true, during the interim of ninety days, the Board would have nothing before it on which to act. In fact, they would not know as a matter of record whether the person, firm or corporation desired a re-issuance of their license.

Further, in Section 10,132, R. S. Mo. 1939, we find this provision:

"* * * For any and every license or certificate given or issued by the board, a fee of two dollars (\$2.00) shall be paid by the person receiving same. * * *"

If the board attempted to reissue a license on its own motion, we do not see how this condition in Section 10,132, supra, could be met, for if the licensee were permitted to pay the \$2.00, then he would be doing indirectly that which he could not do directly until the expiration of ninety days and would amount to a subterfuge.

Your Question No. 2 reads in part as follows: "Does the original decision of the board revoking the license of the barber become final and without power of modification by the board until the expiration of ninety days * * * * ?" Our answer to this question is in the affirmative. We say this for the reason that as heretofore pointed out in this opinion, it is our view that the Legislature, through the use of the word "revoke" and the exclusion of the words "renew" or "suspend" intended that when a license or certificate was revoked, it should be permanent. Of course, the additional authority given to the board that such license may be reissued when after the expiration of ninety days the original licensee can make satisfactory showing that the disqualification has ceased, does not in any way detract from the meaning of the word "revoke." This being true, when the board, in its discretion, exercised its rights under Section 10,137, supra, and revoked the license or permit, the same became final, and the board is without power to modify its ruling for the reason the board, when it revoked the license, would have ascertained through a proper hearing whether or not there were good and sufficient reasons for revoking said license.

It is further our view that through the granting of the additional authority to the board to reissue the license after the expiration of ninety days, and upon a showing by the applicant that the disqualification had ceased, allows the board to issue the new certificate or license on the former qualifications of the applicant, thereby permitting the applicant to obtain a new certificate or permit without again taking the qualifying examinations.

Your third question reads as follows: "If the board does have the power to change or modify its decision without application therefor and on its own motion and without the hearing of additional evidence within what time should such action be taken?" In view of what we have heretofore said in this opinion, your third question becomes a nullity, for the reason that we have ruled that your board would not have the authority to modify its decision where you have once revoked a license through a proper order, and having done so, you would have destroyed and extinguished the license.

CONCLUSION

1. It is the opinion of this department that the State Board of Barber Examiners, having once revoked a license upon

a proper hearing, has no authority to restore that license on their own motion.

2. Further, the State Board of Barber Examiners is prohibited from entertaining an application for the reissuance of a license, as is provided for in Section 10,137, supra, until the expiration of ninety days.

3. When a license is reissued after the expiration of ninety days, as is provided for in Section 10,137, supra, it is in effect a new license. However, the applicant may obtain such license without again taking the qualifying examinations.

The term "revoke" as used in Section 10,137, supra, means to call back; to recall; to annul an act by calling or taking it back.

In view of your direct statement in Question No. 1, we exclude from this opinion a situation where a license was revoked because of fraud or mistake.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

BRC:NH

DEPOSITARIES: Money deposited in depository by county
COUNTY FUNDS: collector, as collector, is "Public Funds."

March 8, 1943

Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Sir:

This is in reply to your request for an opinion,
which reads as follows:

"In checking over the contract the city has for its depository, there does not seem to be sufficient bonds put in escrow by the banks to conform to the law. In considering the matter, however, the question comes up as to whether the funds placed in the banks by the collector, and before they are turned over to the treasurer, are county funds when under the collector's name. In other words, couldn't the contract with the depositories be that the bonds securing the funds shall be an amount equal to the funds on deposit, less \$5,000, by both the collector and the treasurer? There was some feeling in the conference that the collector's funds were not county funds as would be covered by the law. I suppose you have made some rulings relative to this matter, and I would like to have a copy of the same.

"A further question arises in my mind which is as follows: If the county divided its funds into five different funds in each bank, the figure five being just an example as it might be four or eight,

Honorable George A. Spencer (2)

March 8, 1943

would not the FDIC insurance carried by the bank cover \$5,000 under each fund so long as those funds were funds used for wholly different purposes and not just being a division of funds belonging to particular purposes.

"I am not wholly acquainted with the system of funds of counties, but I am making an analogy to the funds of a city such as the general revenue fund, automobile license funds used for street purposes, and water and light funds used for other utility funds."

By a supplemental letter, you have informed this office that your inquiry is as to, "County Depositories," and not, "City Depositories."

Your request consists of two questions, first: Whether or not the funds placed in the county depository by the collector, before they are turned over to the treasurer, are county funds. We are assuming that these funds are placed in the county depository under the name of the collector, as county collector.

Your second question is: Whether or not, if the county divided its funds into five different funds in each bank, the FDIC insurance carried by the bank would cover \$5,000 under each fund, so long as those funds were funds used for entirely different purposes, and it not being just a division of funds belonging to particular purposes.

In answer to your first question, we set out parts of Article 9, Chapter 100, of the Revised Statutes of Missouri, which refer to "County Depositories."

Section 13846 R. S. Missouri, 1939, partially reads as follows:

"It shall be the duty of the county court of each county in this state, at the May term thereof, in the year

March 8, 1943

1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county. For the purpose of letting such funds such county court shall, by order of record, divide said funds into not less than two nor more than ten equal parts, and the bids herein provided for may be for one or more of such parts. * * * * *

Under the above partial section the court, by order of record, may divide said funds into not less than two, nor more than ten equal parts, and the bids may be asked upon one or more parts. This refers to units of the county funds, and not to separate individual funds.

Section 8183 R. S. Missouri, 1939, which can be construed as an amendment to Section 13846, supra, reads as follows:

"Notwithstanding any provisions of law of this state or of any political subdivision thereof, the public funds of every county, * * * * * which shall not or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the Statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 13086 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 87 of the Revised Statutes of Missouri 1939, and all amendments thereto. * * * * *

March 8, 1943

Section 8185 R. S. Missouri, 1939, provides that the various statutory provisions in relation to the advertisement for, and receipt of, bids, which provide for the payment of certain interests by the banks and other miscellaneous provisions shall not apply where, under the law, said banks are prohibited from paying interest upon demand deposits. At the present time banks are not allowed to pay interest on demand deposits, and for that reason it is not necessary that the counties advertise for offer of bids on county deposits, where said deposits are made in banks which are not allowed, by law, to pay interest on such deposits, but, under Section 8184, supra, it is still mandatory that the security for such deposits must still be required.

Article 9, Chapter 39, which contains Sections 8183, 8184 and 8185, as above referred to, must be harmonized with Article 9, Chapter 100, which refers to county depositaries and does not repeal the entire article referring to county depositaries.

In construing statutes the Supreme Court of this State, in the case of *State v. Brown*, 105 S. W. (2d) 909, 1. c. 911, said:

" * * * So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms, nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments." 16 Cyc. 1147. We approved the above excerpt in *State ex rel Columbia National Bank v. Davis*, 314 Mo. 373, 284 S. W. 464."

Also, in the case of *Eagleton v. Murphy*, 156 S. W. (2d) 683, 1. c. 685, the court said:

March 8, 1943

" * * * Under the established rules of statutory construction where there are two laws relating to the same subject they must be read together and the provisions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act general in its terms. State ex inf. Barrett v. Imhoff, 291 Mo. 603, 238 S. W. 122; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S. W. 129. * * * "

In your first question you inquire if the funds deposited by the county collector, as county collector, in the county depository, are public funds, as set out in Section 8183, supra. This State has not specifically passed upon this point, but did, in the case of State v. Igoo, 107 S. W. (2d) 929, 1. c. 933, define "Public Funds." It stated:

"Are the funds created by this section public funds within the meaning of the constitutional provision which prohibits the granting of public money to a private corporation? We think not. 50 C. J. p. 854, sec. 40, defines public funds as follows: 'The term "public funds" means funds belonging to the state or any county or political subdivision of the state; more especially taxes, customs, moneys, etc., raised by operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose * * * * * .'

"The case of State ex rel. v. Olson, State Treasurer, 43 N. D. 619, 175 N. W. 714, 715, 716, defines 'public funds' thus: 'The money referred to in said section is money belonging to the state, which has been accumulated in the treasury as public funds,

which are to be used in carrying on the state government. It means such money as is raised by taxation, or which has accumulated in the treasury by the payment of fees authorized by law to be charged for various purposes."

Under this definition, the money deposited in the county depositary, by the county collector, as county collector for the county, could be held to be public funds.

In the State of Texas, in the case of Austin, Banking Commissioner, et al v. Kiser, 277 S. W. 411, the county collector was attempting to recover money deposited by him, as county collector, in a bank, under what is known in Texas as "The Bank Guaranty Fund," but the act under which the Bank Guaranty Fund was created contained the following exceptions:

"That no deposit upon which interest is being paid or contracted to be paid, either directly or indirectly by said bank, its officers or stockholders to the depositor and no deposit secured in any way shall be insured under this chapter. * * * No deposit of public funds of any kind or character, whether interest bearing or not, deposited in a state bank, shall be insured under this chapter, by the term "public funds" as herein used, shall be meant, funds belonging to the state of Texas, to any county or political subdivision of the state, * * * * ."

The court, in holding that the county collector, by placing the money in the bank under his official title was depositing "Public Funds," said: (l.c. 412)

"The majority are of the opinion that appellee is clearly not entitled to have his commission upon the January

March 8, 1943

collections established as a deposit secured by the guaranty fund for the reason that at the time the bank failed such commissions were public funds, interest bearing, and secured by the depository bond. We think this conclusion necessarily follows upon a consideration of our statutory provisions."

CONCLUSION

It is, therefore, our opinion, that the money deposited by the county collector, as county collector, in the depository for public funds, is deposited in a depository that is covered by the insurance of FDIC, in the amount of \$5,000, and that amount of money can be deducted from the amount of security as required under Section 8184, supra. We would suggest, however, that the bond show that it covers "Public Money."

It is further the opinion of this department, that since Section 13846, supra, only provides for the division of the funds to be deposited in separate and different banks, we find no statutory authority allowing the funds to be deposited in the same bank, under different names, as set out in your request. This is applicable to cities only. We distinguish the difference between the fund of the collector and other funds in that, under Section 11098 R. S. Missouri, 1939, the collector is in charge of public funds, and makes monthly statements and payments to the county treasurer. This section being similar to the section concerning the duties of the county collector, as set out in the case of Austin v. Kiser, supra.

APPROVED BY:

Respectfully submitted

ROY McKITTRICK
Attorney General of Missouri

W. J. BURKE
Assistant Attorney General

WJB:RW

COUNTY COURTS: Two questions on power of county court to make purchases for road equipment and road expenditures.

April 19, 1943



Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We are in receipt of your opinion request dated April 10, 1943. The first question in your letter reads as follows:

"I would like to know your opinion as to whether or not the County Court can order equipment or parts for equipment and exercise supervisory authority over the purchase of such equipment or parts for machinery and so forth used on roads, their construction and maintenance."

From your letter it seems that the highway engineer and the county court seek superiority over each other. Section 36, Article VI of the Constitution of Missouri authorizes the county court as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Concerning the relation of the county court to county property, Section 2480, R. S. Missouri 1939, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The difficulty which has arisen, apparently, is due to the construction of Section 8662, R. S. Missouri 1939, in relation of the highway engineer to the county court. This section provides as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

An analysis of this section, in the opinion of this office, expressly shows that it limits the powers of the county highway engineer to the following powers. First, the highway engineer has "direct supervision" over public roads within the county. Secondly, "direct supervision over expenditures by the road overseers." Thirdly, the highway engineer has supervision over the construction and maintenance of the roads, bridges and culverts. Fourthly, a limitation is imposed on the county court not to

order a road established or changed unless such move is approved by the highway engineer. Fifth, the county court shall not issue warrants "in payment for road work or for any other expenditures by road overseers, or in payment for work done under contract, until the claim" is approved by the highway engineer. In view of these express powers it, apparently, was not the intention of the legislature to vest any other powers in the county highway engineer. The legislature specifically enumerated the powers so given to a county highway engineer in Section 8662, supra, and there is no mention of any power of purchase in the county highway engineer.

Under Section 2480, cited and quoted, the purchasing power is vested in the county court. A previous opinion of this office, herewith attached, rendered December 22, 1942, to the Honorable John H. Thompson, so holds.

CONCLUSION

It is the conclusion of this office in answer to your first question, that the powers of a county highway engineer are specifically enumerated and limited under Section 8662, supra, and said powers do not include the power to purchase or order equipment or parts for equipment for machinery used on the county roads, in their construction and maintenance.

In an answer to your second question, which reads as follows:

"The other question would relate to the expenditure of funds for the actual work of building and maintaining roads. In other words, are each of these a primary duty of the engineer and a secondary duty of the county court, or can the Court proceed without the approval of the engineer in either instance."

We believe that "the expenditure of funds for the actual work of building and maintaining roads" must be made by the county court, subject to the limitation of the last sentence of Section 8662, supra, which provides:

"* * * * * No county court shall issue warrants in payment for road work or for any other ex-

April 19, 1943

penditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer. "

Thus any expenditures by road overseers must be approved by the county highway engineer before the county court can issue warrants in payment of such expenditures. Apparently, the primary duties rest upon the county court in all instances other than those enumerated in Section 8662, supra.

CONCLUSION

Our conclusion, in answer to your second question, is that unless the expenditure has been made by a road overseer the county court has the primary duty under Section 2480, supra, to make payments for the expenditures mentioned in your second question.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WCB:MAW

PROSECUTING ATTORNEY: To give advice to county officers regarding matters of law in which county is interested; but not his duty to advise and represent the various school boards of the county.

September 4, 1943

Opinion No. 84



Mr. George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date, in which you request the opinion of this department. Your letter of request is as follows:

"I presume you have had this question up as to the duties of the Prosecuting Attorney with reference to the county superintendent of schools. There are some sixty-five or seventy school boards in this particular county, and I am wondering if you have a written opinion concerning the duties of advising all of the school boards and the county superintendent of schools and other county officers except the county court, with reference to the various laws of the State.

"As I understand it, where county finances are involved or money due to the county, it is my duty to look after the interest of the county and to advise the county court on all matters before the court, but is it the duty of the Prosecuting Attorney to advise on all laws affecting all other county offices and boards, or should those officers and boards get their information from their own attorney?"

Your questions, which we have deduced from your letter are as follows:

What are the duties of the Prosecuting Attorney in regard to advising the County Superintendent of Schools and other county officials with reference to the various laws of the State?

Is it the duty of the Prosecuting Attorney to give advice to the various school boards of the county?

The general duties of the Prosecuting Attorney in regard to civil matters are set forth in Sections 12944 and 12947, R. S. Mo. 1939, which we quote as follows:

"Sec. 12944. Shall prosecute or defend in civil cases, etc. -- He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any

funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

"Sec. 12947. He shall give his opinion, when. -- The prosecuting attorney shall, without fee, give his opinion to any justice of the peace, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Under the above sections it is clearly the duty of the Prosecuting Attorney to prosecute and defend all civil suits in which the county is interested and represent generally the county in all matters of law.

It is also the duty of the Prosecuting Attorney to investigate all claims against the county and draw all contracts relating to the business of the county.

Section 12944, supra, requires that he give his opinion without fee in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, excepting those counties which have a county counselor. Under this section we think it is the duty of the Prosecuting Attorney to give his opinion, without fee, to county officials in matters of law in which the county is interested, for the reason that if it is his duty to represent the county in litigation of this kind it surely would be his duty to advise the county officials with reference to matters in which the county is interested before the county may be involved in litigation. No hard and fast rule can be set out as to just what matters he is required to advise the county officials upon, but the duty of the Prosecuting Attorney must be determined as each matter arises to ascertain whether it is a county matter or not. What has been said above refers also to the Superintendent of Schools, that is, he should give such superintendent advice in matters of law in which the county is interested.

Concerning your second question "Is it the duty of the Prosecuting Attorney to advise the school boards of his county?" we find nothing in Section 129⁴⁴, supra, or the other sections of the statute pertaining to prosecuting attorneys, which makes it the duty of the prosecuting attorney to advise and represent the various boards of the county, including school boards.

In the case of State ex rel. Wammack and Welborn v. Affolder, 257 S. W. 493, 214 Mo. App. 500, the plaintiff's attorneys had been retained by the county court to advise the county in connection with a bond issue of a certain township of the county and the treasurer of the county refused to honor a warrant for the payment of their fees contending that the duty of advising a township was that of the prosecuting attorney of the county. The court, in this opinion, reviewed the statutes relative to the duties of prosecuting attorneys and held that under the statutes it was not the duty of the prosecuting attorney to represent the township board and so stated in the following language (Mo. App. 1. c. 506):

"* * * Since there is no statute directing generally that the prosecuting attorney shall act for the township in counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to render the services which plaintiffs rendered."

By analogy we conclude that, there being no statute which makes it the duty of the prosecuting attorney to render official services to school districts or school boards, it is not his official duty to do so.

CONCLUSION

It is, therefore, our opinion that it is the duty of the Prosecuting Attorney to give advice to county officials in those matters of law in which the county is interested,

Mr. Geo. A. Spencer

-5-

Sept. 4, 1943

and in writing when demanded, to the county court or any judge thereof.

It is our further opinion that there is no duty on the Prosecuting Attorney to give advice and represent the various school boards of his county.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

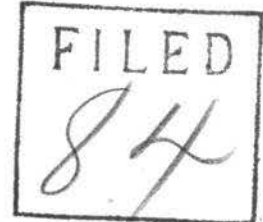
ROY MCKITTRICK
Attorney-General

CRH:CP

LABOR: Industrial Inspection statute will apply to dress shops, drug stores, plumbing establishments and cooperative associations, but not to shoe shops.

September 16, 1943

10/5



Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Spencer:

This will acknowledge receipt of your letter of September 2, 1943, addressed to the Attorney-General, in which you requested an opinion from this department. This request, omitting caption and signature, is as follows:

"I presume you have written an opinion concerning the constitutionality and applicability of Sections 10179 and 10180 relative to the inspection of various businesses.

"Business people seem to feel this is somewhat of a worthless service as an inspector merely walks into the front door and back to the back and comes back and hands them a bill. I know this is the enforcement end of it, but the particular question I am interested in is whether or not it would apply to drug stores, dress shops, shoe shops, plumbing establishments, the local cooperative association and similar businesses.

"Thanking you for an opinion on this matter,"

The inspection of certain businesses is provided for in Section 10179, R. S. Mo. 1939. This section of the statute provides as follows:

"The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments; Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

All of the powers and duties of the state industrial inspector and his deputies have been transferred to the Commissioner of Labor and Industrial Inspection and his deputies. This transfer is prescribed in Section 10141, R. S. Mo. 1939. This section of the statutes is as follows:

"All the Powers now conferred upon the commissioner of labor statistics, and the industrial inspector, as provided by law are transferred to the department of labor and industrial inspection, and conferred upon the commissioner of labor and industrial inspection provided for in this article, and said commissioner shall be chargeable with all the duties of enforcing the provisions of this chapter and shall be liable to all the penalties to which any of the commissioners, boards or bureaus, stood amenable by law at the time this section took effect, it being the declared purpose of the General Assembly to effect a consolidation, under the single department created by this article, of the departments of labor statistics, and industrial inspection, as now provided by law, and to transfer the powers, duties and functions of these departments, commissions, boards and bureaus to the department created by this article, in order to bring about a more orderly and economical administration of the laws pertaining thereto."

The constitutionality of the statute relating to industrial inspection and the collection of a fee for such service has been questioned and upheld by the courts of this State in the case of State v. Vickers, 186 Mo. 103, 84 S. W. 908. The court further held that this inspection fee was not a tax upon property.

Consequently, the only other question to be considered is whether the five businesses set out in your letter will come under any of the occupations mentioned in Section 10179, R. S. Mo. 1939, aforesaid. Therefore, the best procedure would seem to us to be to look at the definition of the terms set out in the statute.

A "mercantile establishment" has been defined as:

"A place where the buying and selling of articles of merchandise is conducted." Veazy Drug Co. v. Bruza, 37 P. (2d) 294, 169 Okla. 418.

and

"A place where the buying and selling of articles of merchandise is conducted, and the conducting of such an establishment implies operations conducted with the view of realizing the profits which come from skillful purchase, barter, speculation and sale." Hotchkiss v. Dist. of Columbia, 44 App. D. C. 73, 79.

also,

"'Mercantile business' which requires licensing consists of the sum of transactions of buying and selling, and hence merchant can neither buy nor sell until he is licensed." State v. Mason (Utah), 78 Pac. (2d) 920, 925.

In your request there are five different businesses set out. They are drug stores, dress shops, plumbing establishments, cooperative stores and shoe shops. With the possible exception of the last named, to-wit, "shoe shops," we feel that all of them come within the purview of the statute. There can be no doubt but that a drug store and a dress shop are mercantile establishments, since they are both places where commodities are bought and sold presumably for a profit. If the "dress shop" is an establishment which manufactures dresses, it would then be covered by the term "manufacturing" establishment.

We further believe that a "plumbing establishment," at least one that offers merchandise for sale, would be covered by this statute. Common experience teaches us that as a general rule all such establishments do offer merchandise for sale. Likewise, we believe that a cooperative association would be subject to inspection as provided by Section 10179, R. S. Mo. 1939, since it is an establishment where merchandise of one kind or another is bought and sold.

As to the last business mentioned in your request, which was a "shoe shop," it is questionable whether the statute would govern this occupation. We presume by the term "shoe shop," you mean a business store where shoes are repaired and not a

Sept. 16, 1943

store where shoes are sold. If we are correct in this presumption, and that you refer to a strict shoe repair business, it is extremely doubtful that the above statute will be enforceable.

In making the above statements we wish it understood that the actual facts with reference to each individual case will have a great deal of bearing on the question of the applicability of the statute. In other words, if a "shoe shop" included a shoe repair shop and also a place where shoes were bought and sold, then in such case the statute would apply. However, we do feel that the statements we have made are correct in so far as we can construe the statute with the information at hand.

Conclusion.

Therefore, it is the conclusion of this department that Section 10179, R. S. Mo. 1939, will apply to drug stores, dress shops, plumbing establishments and cooperative associations, since they are mercantile establishments. However, we do not think that it will apply to a "shoe shop" if such term is used in the sense of a shoe repair establishment.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

STATE BOARD OF HEALTH: Power to transfer venereal disease patients
REGULATIONS: for quarantine in hospital in the State
of Missouri.

March 29, 1943



Honorable James Stewart, M. C.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of March 18, 1943, which reads:

"There is being contemplated at this time the establishment of a large Isolation Hospital for infectious venereal diseases in Missouri by the United States Public Health Service.

"I would like to have an opinion from your office on the following question:

"Does the State Board of Health have the power to transfer venereal disease patients across county borders for quarantine in a Federal or State quarantine hospital?"

There are statutory provisions now for the county court to send indigent insane persons to hospitals in counties other than that in which the insane persons reside, upon notice to the person to be confined and hearing before a court or jury, if desired. (See Sections 9335-9342, inclusive, R. S. Missouri 1939.)

Under Section 9735a, page 371, Laws of Missouri 1941, the State Board of Health is directed to comply with the provisions of any act of Congress for distribution of funds of the United States appropriated by Congress for health purposes and comply with any of the rules or conditions made by the United States Public Health service.

There is also a special fund under this section known as the Venereal Disease Control Fund to be drawn out of the State treasury on warrant by the executive officers of the State Board of Health.

Section 9735, R. S. Missouri 1939, provides the duties of the State Board of Health and reads:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

Also, other duties were added by the Sixty-first General Assembly. However, these are not pertinent except as shown by Section 9735a, supra.

Section 9736, R. S. Missouri 1939, provides the Board shall designate diseases which are infectious, contagious, communicable or dangerous in nature and shall make and enforce regulations and procedures to prevent the spread of such diseases within the State.

"The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

Section 9748, R. S. Missouri 1939, provides all rules and regulations authorized by the State Board of Health shall supersede local ordinances, and shall be observed throughout the State and enforced by all local and state health authorities.

"All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

In Volume 59, C. J., Section 120, page 112, we find the following as to territorial jurisdiction of state officers.

"Jurisdiction of state officers is coextensive only with the territory of the state from which they derive their powers."

Also, in Volume 59, C. J., Section 96, page 107, points out that it is well established that all regulations promulgated must comply with the manner prescribed by statute to have the force and effect of law.

In Ex parte Lucas, 61 S. W. 218, 130 Mo. 218, 1. c. 233, the court holds that it is clearly within the police power of the State to regulate and prevent the spread of contagious diseases.

"* * * * * Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the State, and are universally sustained where enacted in the interests of the public welfare. * * * * *

Therefore, it is the opinion of this Department that in view

Hon. James Stewart, M. D.

-4-

March 29, 1943

of the foregoing statutory provision making it the duty of the State Board of Health to safeguard the health of the people all over this State and to make and enforce adequate rules and regulations and procedure to prevent the spread of such infectious, communicable or dangerous diseases, and in addition to the above, with the police power vested in the State of Missouri through the State Board of Health, unquestionably the Board may promulgate regulations requiring the transfer of such venereal diseased patients as it considers necessary for the protection of the public to such quarantine quarters in a hospital within the State of Missouri.

Respectfully submitted

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

ROY McKITTICK
Attorney General of Missouri

ARR:BAW

HEALTH: Physicians, osteopaths, veterinarians and hospitals must secure state license to engage in occupations set out in Section 9834, R. S. Mo. 1939.

April 22, 1943.

4-26
FILED
85

James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Stewart:

The Attorney-General wishes to acknowledge receipt of your letter of April 15, 1943, requesting an opinion of this Department. Your letter of request is as follows:

"Will you please advise me whether or not Section 9834, Revised Statutes 1939, requires the State Board of Health to license physicians, osteopaths, veterinarians, and hospitals under the State Narcotic Act."

Although your inquiry above does not so state, we must assume for the purposes of this opinion that the license mentioned in your request would be a license to permit the persons named therein to transact the several types of occupations set out in Section 9834, R. S. Mo. 1939. Proceeding on such premise, the only question involved is whether physicians, osteopaths, veterinarians and hospitals are subject to the provisions of Section 9834, supra, if they wish to engage in any of the activities or occupations set out in such section of the statutes.

Section 9834, R. S. Mo. 1939, mentioned in your request, provides as follows:

"No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license so to do from the State Board of Health."

It will be noted from a study of the statute that it deals with the production or manufacture of narcotics by any "person" and also provides that a wholesaler shall not be permitted to supply such narcotics without a license. This statute does not provide that it is necessary that a license be secured before a person may possess or have in his possession, certain narcotics, but only prescribes for a license for any person to "manufacture, compound, mix, cultivate, grow or by any other process produce or prepare narcotic drugs." It is plainly evident that if an individual, association or corporation intends to engage in any of the activities mentioned in the statute under consideration, such person, association or corporation is required to secure a license from the State for that specific purpose. Consequently, the only remaining consideration is whether physicians, osteopaths, veterinarians and hospitals are included in the category of "person," as such term is used in this section of the statute.

Section 9832, R. S. Mo. 1939, is entitled "Definitions" and defines certain terms used in Article 6, Chapter 57, in which article and chapter we find Section 9834, supra. The first term defined is "person," and such definition prescribes the following:

"'Person' includes any corporation, association, copartnership, or one or more individuals."

By applying the above definition to the particular occupations specified in your request for an opinion, we believe that all such occupations will come under the term "person." Therefore, if a physician, osteopath, veterinarian or hospital wishes to engage in any of the activities set out in Section 9834, R. S. Mo. 1939, to-wit, manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, or supply such as a wholesaler, it is first incumbent upon them to secure a license so to do from the State of Missouri.

Conclusion

It is, therefore, the opinion of this Department that if a physician, osteopath, veterinarian or hospital desires to

James Stewart, M. D.

-3-

April 22, 1943

engage in any of the activities set out in Section 9834, R. S. Mo. 1939, it is necessary that a license so to do be secured by them.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JSP:EG

HEALTH, STATE BOARD OF:
OPERATION OF HOSPITAL:

State Board of Health may operate
hospital for Federal Government when
all funds are furnished by the Federal
Government.

July 13, 1943



Dr. James Stewart
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein
you submit the following statement and request:

"The Federal Works Agency, through funds
granted by the Lanham Act, has suggested
that funds would be available to build
or to reconstruct an existing school
building in Waynesville into a general
hospital facility and on completion of
same the hospital and equipment would
be assigned to the State Board of Health
for operation."

"In view of this proposal I would like
to have an opinion from your office re-
garding the following question:

"Has the State Board of Health authority
to operate a general hospital when all
funds to be used in the operation and
maintenance of such institution are
granted to the State Board of Health
by an agency of the Federal Government."

The duties of the State Board of Health, which is set
up under the provisions of Chapter 57 R. S. Mo. 1939, are
prescribed under Section 9735 of that Chapter. This section
reads as follows:

"It shall be the duty of the state
board of health to safeguard the health
of the people in the state, counties,
cities, villages and towns. It shall
make a study of the causes and prevention

July 13, 1943

of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

As a general rule, officers and agents of the state derive their authority from the Constitution or statutes creating such office or agency. In addition to the powers granted under Section 9735, supra, the General Assembly in Laws Mo. 1941 at page 370 amended said Section 9735 by adding Section 9735a which related to the duties of the State Board of Health with respect to cooperating with the Federal Government in the Public Health Service. This section reads as follows:

"The State Board of Health is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for Health purposes and to comply with any of the rules or conditions made by the United States Public Health Service. The Children's Bureau or any other Federal agency in regard to health funds distributed to the states, and to comply with any of the rules and conditions made by said services or bureaus or other branches of the United States Government acting under the provisions of the Federal law in order to secure for the State of Missouri funds allotted to this state by the United States Government or (for) health purposes under the provisions of such acts of Congress, relating to health; said funds shall be received by the State Treasurer and deposited in separate funds to be known as the United States Public Health

July 13, 1943

Title VI fund, the Venereal Disease Control fund, the Children's Bureau fund, and any other fund specially designated by a Federal Agency for the use of the State Board of Health for health purposes, and to be paid out by the State Treasurer on requisitions drawn by the executive officers of the State Board of Health on a warrant of the State Auditor. Said funds being allotted to the State of Missouri for health purposes by the Federal Government the General Assembly shall appropriate the same to the use of the State Board of Health, under such provisions as are set out for the reception and use of funds by the Federal Government."

By the first sentence of this section, it seems that the General Assembly had in mind such a contingency as you have related in your request. In the case of *In re Lenski v. O'Brien*, 207 Mo. Appeal 224, 229, a principle is announced and applied which we think is applicable here. It relates to the authority of a state agency to execute a duty imposed by an act of Congress. The principle is as follows:

"***** That authority to enforce a Federal statute, or to execute a duty imposed under an act of Congress may be conferred upon State officers as such, and that such officer may execute the same unless prohibited by the constitution or statutes of the State is no longer open to question. (*Priggs v. Pennsylvania*, 16 Pet. 539, l.c. 622; *Robertson v. Baldwin*, 165 U. S. 275; *Dallemagne v. Moisan*, 197 U. S. 169, l.c. 174.)*****"

The 61st General Assembly appropriated the Federal funds in accordance with the provisions of 1935a, supra, Laws Mo. 1941, pp. 220, 221.

Dr. James Stewart

-4-

July 13, 1943

CONCLUSION.

From the foregoing, it is the opinion of this department that the State Board of Health would be acting within the scope of its authority to operate a general hospital when all funds to be used in the operation and maintenance of such institution are granted to the State Board of Health by an agency of the Federal Government.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:PD

NURSES:

Not unlawful for one person to represent to the public that another person is a registered or graduate nurse.

July 15, 1943

7/15



Miss Mary E. Stebbins, R. N.
Executive Secretary,
Missouri State Nurses' Association,
1512 Waldheim Building,
Kansas City, Missouri

Dear Madam:

This will acknowledge receipt of your letter of July 8th, presenting for our opinion the following question:

"Is it unlawful under Section 10031, R. S. Mo. 1939, for a person to knowingly employ and put on duty as a registered nurse persons registered in other states, but who are not registered in Missouri?"

Section 10031 above referred to provides as follows:

"It shall be unlawful for any person not legally licensed as such to take, use or exhibit the title of 'registered nurse' or 'graduate nurse' or the abbreviation thereof as set forth in Section 10036 of this chapter and it shall be unlawful for any person not so legally licensed to hold himself or herself out as or represent that he or she is a registered nurse or graduate nurse unless duly licensed as such under the provisions of this chapter, and any person who shall violate the provisions of this section or any prohibition contained in this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) for each offense; * * * "

Analysis of this section shows that it is directed at a person not licensed as a nurse holding himself and herself out

Miss Mary E. Stebbins, R. N.

-2-

July 15, 1943.

as such. That fact is to be gleaned from that portion of the statute making it "* * unlawful for any person not so legally licensed to hold himself or herself out as or represent that he or she is a registered nurse or graduate nurse * *". This law clearly restricts the crime there defined to the unlicensed individual and does not make it a misdemeanor for some other person to hold out that an unlicensed individual is a registered nurse.

An examination of Chapter 61, R. S. Mo. 1939, relating to the licensing and registration of nurses does not disclose a single provision which will reach or make unlawful the type of activity presented in your opinion request.

CONCLUSION

It therefore is our opinion that Section 10031, R. S. Mo. 1939, does not make it unlawful for an individual to hold out or represent that another person is a registered or graduate nurse.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

LLB:jn

PHYSICIANS:) OBSTETRICS: Who may practice
AND) in Missouri.
SURGEONS:)

July 29, 1943

Honorable James Stewart, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri



Dear Dr. Stewart:

We are in receipt of your letter of July 19th, 1943,
requesting an opinion, which letter is as follows:

"A Federal enactment of H. R. 2935 approved July 12th, 1943, appropriated certain funds to the Department of Labor, Children's Bureau, for the fiscal year 1944 for grants-in-aid to State Health Departments to carry on state Maternal and Child Health services and Emergency and Maternity and Infant Care services within the jurisdictions of individual states. H. R. 2935 as finally approved contained the following provisos:

"Provided, That no part of any appropriation contained in this title shall be used to promulgate or carry out any instruction, order, or regulation relating to the care of obstetrical cases which discriminates between persons licensed under State law to practice obstetrics.

"Provided further, That the foregoing proviso shall not be so construed as to prevent any patient from having the services of any practitioner of her own choice, paid for out of this fund, so long as State laws are complied with."

July 29, 1943

"Prior to the enactment of this law the Children's Bureau, Department of Labor, Washington, D. C., required of the various State Health Agencies to meet certain standards for practitioners participating in any program that was subsidized, in part or in full, from Federal grants-in-aid under the Social Security Act as amended in 1939. Following the regulations of the Children's Bureau, The State Board of Health, wrote and submitted for approval a plan for administration of the Emergency Maternity and Infant Care Program for the fiscal year 1944. This plan, a copy of which is enclosed, was approved by the Children's Bureau, Washington, D. C., and was set in operation by the Division of Child Hygiene, of the State Board of Health, as of June 21st, 1943. Using Federal funds appropriated under Public Law # 11, approved as of March 18th, 1943, (a copy of which may be found in the Federal Register, Volume 8 # 62, Page 3859, Title 42-Public Health, dated March 30th, 1943), the State Board of Health received through the State Treasurer of the State of Missouri, the sum of \$30,000.00, known as Fund E, to carry out the Emergency Maternity and Infant Care Program for the State of Missouri. All subsequent funds from the Children's Bureau as grants-in-aid must necessarily come from appropriations as found in H. R. 2939.

"The State Board of Health wished to cooperate with the Children's Bureau, Washington, D. C., in carrying out the provisions of the state Emergency Maternity and Infant Care Plan. H. R. 2935 by its proviso confuses our interpretations as to standards of medical services for obstetric care as provided under this program. Will you please review the Statutes of Missouri and designate to the State Board of Health those individuals that may practice obstetrics.

Honorable James Stewart, M. D.

(3)

July 29, 1943

"It is necessary that the State Board of Health submits to the Children's Bureau a statement of legality from the office of the Attorney General of Missouri before the 1944 Maternal and Child Health plan and budgets may become effective. Therefore, may I request as early a reply from your office as possible."

Section 9981 R. S. Missouri, 1939, provides as follows:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as hereinafter provided."

Section 9983 R. S. Missouri, 1939, providing for the examination of physicians, reads in part as follows:

" * * * The medical examination * * * shall embrace the subjects of anatomy, chemistry, physiology, therapeutics, obstetrics, * * * * * ." (Underscoring ours.)

Section 9993 R. S. Missouri, 1939, provides, in part as follows:

"It shall be unlawful for any person to practice midwifery in this state before receiving a license to do so. Every person desiring to practice midwifery as a profession shall make application to the state board of health for examination and pay a fee of five dollars. And upon passing an examination satisfactory to said board upon the subject of obstetrics, shall

Honorable James Stewart, M. D.

(4)

July 29, 1943

receive a license to practice as above
provided. * * * * *

Section 10042 R. S. Missouri, 1939, declaring osteopathy
not to be the practice of medicine, is as follows:

"The system, method or science of treat-
ing diseases of the human body, commonly
known as osteopathy, and as taught and
practiced by the American school of os-
teopathy of Kirksville, Missouri, is here-
by declared not to be the practice of medi-
cine and surgery within the meaning of
article 1 of chapter 59 and not subject to
the provisions of said article."

This section first appears in Laws of Missouri, 1897, at
page 206.

Section 10044 R. S. Missouri, 1939, providing for the
examination of osteopaths, in enumerating the subjects, is,
in part, as follows:

" * * * The board shall subject all ap-
plicants to an examination in the subjects
of anatomy, physiology, physiological chem-
istry, toxicology, osteopathic pathology,
diagnosis, hygiene, obstetrics and gynecol-
ogy, surgery, principles and practice of
osteopathy, and such other subjects as the
board may require: * * * * * ."

Section 10046 R. S. Missouri, 1939, provides as foll-
ows:

"Osteopathic physicians shall observe and
be subject to the state and municipal regu-
lations relating to the control of conta-
gious diseases, the reporting and certifi-
ing of births and deaths, and all matters
pertaining to public health, and such re-
ports shall be accepted by the officer or
department to whom such report is made."

Honorable James Stewart, M. D. (5) July 29, 1943

The foregoing section, in requiring that osteopaths report and certify births, indicates a legislative intent to recognize their right to practice obstetrics, since the same burden and authority is placed on midwives, nurses and physicians. (See Section 9994 R. S. Missouri, 1939).

Whether or not osteopaths are authorized to practice obstetrics depends principally upon the construction of Section 10042, supra. The system, method, or science, of osteopathy is limited to that which was taught and practiced by the American School of Osteopathy at Kirksville, Missouri, probably at the time this statute was passed in 1897.

In construing a statute on the same subject in the state of Kansas, which statute contained a similar provision, the Supreme Court of Kansas, in the case of State ex rel. Beck, Attorney General v. Gleason, 79 Pac. (2d) 911, 1. c. 916, gave said provision the following construction:

"1. (a) Is the osteopathic statute prospective in operation, or (b) are osteopathic physicians limited to the state of the science and art as taught and practiced in 1913, when the statute was enacted? Answering the first part of this question, (a), the statute was prospective in operation; that is to say, it was designed to operate in the future. After the enactment of our first statute recognizing osteopathy as a system or school of thought and practice for the treatment of the sick, injured, or afflicted, no one could practice osteopathy lawfully in this state unless he held a certificate authorizing him to practice osteopathy issued by the state board authorized by statute to issue such certificates. From 1901 to 1913 this was the state board of medical registration and examination. Since 1913 it has been the state board of osteopathic registration and examination. The statute did not operate retrospectively so as to punish those who had practiced osteopathy previous to the effective date of the statute. (b) Osteopathic physicians, meaning by that term those to whom certificates have been issued authorizing them to practice osteopathy in this state by a state board

authorized to issue such certificates, are limited to the practice of osteopathy in harmony with the fundamental principles of osteopathy, or what is sometimes spoken of as the science or system of osteopathy (G. S. 1935, 65-1206), as generally known and understood and as taught in osteopathic schools or colleges of good repute in 1901 and 1913. Osteopaths, in common with all scientific and professional men, are expected to continue to study, to make progress, to learn more about their profession, and to apply such knowledge in their practice, but they are still engaged in the practice of osteopathy, as that science or system was known and understood when our statutes above mentioned were enacted. They are not authorized to practice optometry (State ex rel. v. Eustace, 117 Kan. 746, 233 P. 109), or any of the other professions which require a specific certificate of authority. If, as suggested by counsel for defendant, osteopathy has abandoned its fundamental opposition to drug therapy and operative surgery (meaning by this term surgery by the use of surgical instruments), and now includes the use of those things in its system, that fact never has been recognized by the legislature of this state. Our statutes continue to recognize the 'practice of osteopathy' and the 'practice of medicine and surgery' as separate and distinct things. A certificate authorizing one to practice osteopathy, whether issued prior to 1913 by the board of medical registration and examination, or since that time by the board of osteopathic registration and examination, never has been recognized by our statutes, nor by our courts, as authorizing its holder to engage in the 'practice of medicine and surgery' in this state."

The same general conclusion was reached by the Supreme Court of Kansas in the case of State ex rel. v. Moore, 117 Pacific (2d) 598.

Honorable James Stewart, M. D. (7)

July 29, 1943

At our request, the Missouri State Board of Osteopathic Registration and Examination furnished us with the following letter:

"The Missouri State Board of Osteopathic Registration and Examination has investigated the provisions of the Statutes of Missouri pertaining to osteopathic teaching, examination and practice as originally enacted in 1903, (for more than forty years) and revised or as amended to date, and reports, that

"Each college recognized as reputable has satisfactorily taught obstetrical pre-natal and post-natal care.

"We have examined all records and have found the following to be true according to our records: that each Applicant has had a written examination in obstetrics and has passed that examination before a certificate to practice osteopathy was issued and as required in the Missouri Statutes Section 13516 to 13521-A. (R. S. Mo. Statutes 1939)

Respectfully yours,

Missouri State Board of Osteopathic
Registration and Examination

A. B. Cooter, D. O.

President

F. C. Hopkins, D. O.

Secretary

SEAL

By direction of the Board
In Session, St. Louis, Missouri
July 24, 1943."

Chapter 61 of the Revised Statutes of Missouri, 1939, provides for a State Board of Nurse Examiners, and sets out the general qualifications for the examination and issuance of licenses to nurses.

Section 10032 R. S. Missouri, 1939, provides as follows:

"The Board shall issue a license to practice as a registered nurse or registered obstetrical nurse in the state of Missouri.

"1. Any person who shall be admitted to and pass the board's examination therefor.

"2. Any applicant of good character from another state or a foreign country who shall pay a fee of twelve dollars (\$12.00) and submit to the board satisfactory evidence, verified by oath if required, of due registration, as a registered nurse or by another state or country having equal requirements or if in the judgment of the board said applicant's individual qualification be the equivalent of those required by this chapter."

Section 10035 R. S. Missouri, 1939, reads as follows:

"The Board shall admit to examination for license and upon the passing of such examination and the payment of a fee of ten dollars (\$10.00) shall license to practice as an obstetrical nurse any applicant possessing all the requirements of section 10034, except in lieu of the course in a school of nursing, shall have graduated from a school attached to a maternity hospital having a course of training requiring eighteen (18) months for completion. And such persons shall be entitled to append the letters 'O. N.' to his or her name: Provided, that any applicant who is a graduate of a school of obstetrical nursing which gave at the time of applicant's training a course of two school years of not less than an aggregate of eighteen months, and who has heretofore been licensed as an

July 29, 1943

attendant under the law of 1921, and who has paid the fee of ten dollars (\$10.00) as required by said law, shall be granted a license by the board as a registered obstetrical nurse without examination upon the payment of a fee of ten dollars (\$10.00)."

It will be noted from the authorities above cited, that physicians, midwives, nurses and osteopathic physicians, are required to report births. The only case that we have been able to find where this subject has been judicially determined, is the case of State ex rel. Johnson, Attorney-General v. Wagner, et al (Neb. Sup. Ct. 1941), 297 N. W. 906, 1. c. 912, where the court said:

"To obtain a license to practice osteopathy, respondent was required to exhibit a diploma issued by a regular school of osteopathy wherein the curriculum included instruction in certain subjects required by statute, one of which was obstetrics. He was also required to pass an examination in the required subjects. While these facts alone would not authorize respondent to engage in the practice of obstetrics, yet, when considered with the statute regarding the reporting of childbirths, together with the history of its development, we think the legislature authorized respondent, upon securing a license to practice osteopathy to engage in the practice of obstetrics. As was said in *Stoike v. Weseman*, 167 Minn. 266, 208 N. W. 993: 'Unless an osteopathic physician could lawfully attend a woman in childbirth, there would be no reason for requiring him to report the birth of the child.' * * * * *

It is fundamental principle of statutory construction that the legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the preexisting law and any other acts relating to the same subject. We

July 29, 1943

therefore reach the conclusion that the legislature has recognized obstetrics as a branch of osteopathy, a conclusion which the court is obliged to follow until the legislature by specific action evidences a contrary view. We are therefore of the opinion, after an examination of the legislative history of the laws pertaining to osteopathy and their relation to obstetrics and regulatory requirements as to reporting child-births, that the legislature has authorized a licensed practitioner of osteopathy to engage in the practice of obstetrics, * * * * *

In the practice of obstetrics, nurses must stay within the limits of the nursing profession and not attempt to perform the duties of a doctor. In the case of *Commonwealth v. Porn*, 82 N.E. 31, 196 Mass. 326, 17 L.R.A., N.S., 94, 13 Ann. Cas. 569, it was held that when, in addition to ordinary assistance in the normal cases of childbirth, there is the occasional use of obstetrical instruments, and a habit of prescribing for conditions described in printed formulas which the defendant carried, such a course of conduct constitutes a "practice of medicine" in one of its branches. Although childbirth is not a disease, but a normal function of women, yet the "practice of medicine" does not appertain exclusively to disease, and obstetrics as matter of common knowledge has long been treated as a highly important branch of the science.

CONCLUSION

It is the opinion of this department that the individuals who are authorized to practice obstetrics, under the laws of this State, are duly licensed physicians and surgeons, duly licensed midwives, duly licensed osteopathic physicians, and duly licensed nurses.

That statutes do not define the extent to which these individuals may practice obstetrics within their particular provisions. This question appears to be one of fact depending upon the particular profession. For instance, it is

Honorable James Stewart, M. D.

(11)

July 29, 1943

obvious that a nurse may practice obstetrics only as a nurse
and not as a physician.

Respectfully submitted

LEO A. POLITTE

Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General

LAP:RW

HEALTH
REGULATION

(REGULATION TO COMMISSIONER OF HEALTH
(IN REGARD TO EGGS.

September 13, 1943



Honorable James Stewart
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date on the validity of your proposed regulation pertaining to eggs.

The proposed regulation reads as follows:

"A duly authorized agent of the State Board of Health may suspend from sale a lot of shell eggs when inedible eggs are found in the lot; a duly authorized agent of the State Board of Health may suspend from sale a lot of broken eggs when inedible eggs are found in part or all of the containers. A lot of shell eggs suspended from sale may be candled under supervision of an agent of the State Board of Health, and the edible eggs separated from the inedible; or, if in broken form, the containers of edible eggs may be separated, under supervision of an agent of the State Board of Health, from the containers of inedible eggs.

"The State Board of Health or its agents may release from suspension all eggs found to be edible. Inedible shell eggs may be disposed of after the shell of each egg has been broken and the shells and eggs denatured so they cannot be used for human food. Inedible broken eggs may be disposed of when denatured so they cannot be used for human food. Pure kerosene or any other denaturing agent specified or approved by the State Board of Health, used in sufficient quantity to be easily detected by smell or sight shall be used to denature all inedible eggs."

Authority for such regulation must be derived from the statute.

Committee substitute Senate Bill for Senate Bill 79 of the 62 General Assembly contains the law covering the authority of the Commissioner of Health in relation to Food and Drugs.

Sec. 9861 of C. S. S. B. 79 of the 67th General Assembly reads in part as follows:

"Whenever a duly authorized agent of the State Board of Health finds or has probable cause to believe, that any food is adulterated,*** he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being, adulterated *** and has been detained *** and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by such agent or the court. It shall be unlawful for any person to remove or dispose of such detained *** article by sale or otherwise without such permission."

Sec. 9865 of said bill also provides in part as follows:

" A food shall be deemed to be adulterated *** if it consists, in whole or in part, of any diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food:***"

Sec. 9905 H. B. 393 of the 62nd General Assembly, provides as follows:

"No person, firm or corporation shall sell, or have in his possession with intent to sell, offer or expose for sale, or traffic in, any egg unfit for human food, unless the same is broken in shell and then denatured so that it cannot be used for human food. For

Sept, 13, 1943

the purposes of this article, an egg shall be deemed unfit for human food if it be addled or mouldy, a black rot, a white rot, or a blood ring; or if it has an adherent yolk, or a bloody or green white; or if it has been in an incubator; or if it consist in whole or in part of a filthy, decomposed or putrid substance. Any person, firm or corporation violating the provisions of this act shall be guilty of a misdemeanor. " ***

Sec. 9912 R. S. Mo., 1939, provides in part as follows:

"It shall be unlawful to ship or otherwise dispose of for manufacturing purposes or for food, in any kind of a container or in any other manner, any egg or collection of eggs, or any eggs known as yolks stuck to the shell, heavy blood rings, partially hatched, mouldy eggs, black spots, black rots or any other eggs of an unwholesome nature, unless the same are cased and labeled, or broken in the shells and then denatured so as to render them unfit for human food. "***

C O N C L U S I O N .

Comparing the proposed regulations with the above statutes we think they come within the bounds of same and that they are valid.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

TWB:LeC

APPROVED:

ROY McKITTRICK
Attorney General

STATE BOARD OF HEALTH: 1) Present and Acting Board has no jurisdiction or authority to entertain a petition to reinstate license "Permanently revoked" by predecessor board.

2) "Revoke" as used in Section 9990 R.S. Mo. 1939, means permanent revocation where no definite period of time is stated.

3) Revocation of license by predecessor board does not prevent a subsequent board from granting a license based on new application.

October 6, 1943

11/29
FILED
85

Dr. James Stewart
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

We are in receipt of your opinion request of September 30, 1943, which reads as follows:

"The records of the State Board of Health reflect that on the tenth day of March, 1937, the following entry was made:

" ' DR. SMITH: THE BOARD WILL NOW CONSIDER THE COMPLAINT FILED AGAINST DR. LUDWIG ORLANDO MUENCH:

"Dr. Ludwig Orlando Muench having been duly notified appeared by council, George B. Calvin. Mr. Calvin made an oral motion that the hearing be continued until such time as Dr. Muench could be present in person, which motion was overruled by the Board. Evidence having been introduced in support of the complaint filed against the said Ludwig O. Muench and argument of council for Dr. Muench having been heard it was moved by Dr. Brandon and seconded by Dr. Bailey that the Board go into executive session, which motion was duly carried.

"The Board in executive session, after considering the evidence introduced in support of the charges filed against Dr. Muench on motion of Dr. Bailey seconded by Dr. Brandon, which motion was unanimously carried, found that Dr. Ludwig Orlando Muench was guilty of unprofessional and dishonorable conduct as charged in the complaint filed with the State Board of Health against him and ordered that his license to practice the profession of medicine and surgery in the State of Missouri be PERMANENTLY REVOKED."

"Will you please advise me if the present State Board of Health has the jurisdiction or authority to entertain a petition of Dr. Ludwig Orlando Muench for the purpose of restoration of his license to practice medicine and surgery. In other words do the words, "permanently revoked," deprive the present Board of jurisdiction.

"Thanking you very much I remain,"

Your opinion request has to do with the interpretation and construction to be placed on Article 1, Chapter 59, R.S. Mo. 1939, and particularly Section 9990 of which section reads as follows:

"The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes, and in cases where the license has been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section. At least twenty days prior to the date set for any such hearing before the board for the revocation of such license, the secretary of the board shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original writs in civil actions. Said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the board shall, after receiving satisfactory evidence of the truth of the charges and the proper issuance and service of notice, revoke said license. If

the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider depositions and oral statements and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. ***"

We shall divide your question into two parts to wit:

- 1) "Will you please advise me if the present State Board of Health has the jurisdiction or authority to entertain a petition of Dr. Ludwig Orlando Muench for the purpose of restoration of his license to practice medicine and surgery."
- 2) "In other words do the words, 'permanently revoked', deprive the present Board of jurisdiction."

We shall first take the second portion of your question. In the case of State ex rel. Ball v. State Board of Health et al, 26 S.W. (2d) 773, l.c. 777, paragraph 7-9, wherein the court had this to say:

"* * *For the reasons stated, we hold that it was not necessary for the record to affirmatively show that the board found relator guilty of the offense charged, as a prerequisite to the order revoking the license. Neither do we think that the order revoking the license is void because it does not state a period of time for which the license was revoked. The statute provides that the license shall be revoked for such period of time as may be agreed upon. The members of the board may agree to revoke for a limited period of time or for all time, and where, as here, the order revoking the license does not name any specified period of time, it necessarily means a permanent revocation for all time."

From the reading of the aforesaid case we must conclude that it made no difference whether the Board in the order of March 10, 1937, used the words "permanently revoked" or had merely used the word "revoked".

Now turning to the first portion of your question which reads as follows:

"Will you please advise me if the present State Board of Health has the jurisdiction or authority to entertain a petition of Dr. Ludwig Orlando Muench for the purpose of restoration of his license to practice medicine and surgery."

From the reading of the question of aforesaid we observe that the petition referred to in the question, is a petition to reinstate the license that was revoked by your Board on March 10, 1937, and said question will be considered in that light throughout this opinion. In making this determination we should decide whether or not the order of your Board on the 10th day of March, 1937, was judicial, quasi judicial or merely ministerial in character. In the case of the State ex rel. McCleary v. Adcock et al., Constituting State Board of Health, 206 Missouri, page 550, l.c. 557, the court had this to say:

"* * * Grant it, for the purposes of this case, that these boards are clothed with discretionary powers, yet an unwarranted exercise of that discretion is a subject-matter for review. They are not judicial bodies."

And in the case of the State ex rel. McAnally v. Goodier et al., 195 Missouri, page 551, l.c. 559, the court had this to say:

"* * * The State Board of Health is not a court, is not a judicial tribunal; it can issue no writ, it can try no case, render no judgment; it is merely a governmental agency, exercising ministerial functions; * * *"

and on page 560, the court had this to say:

"* * * The statute above quoted says the board may refuse to issue the certificate, or may revoke it after it has been issued, if the man is unworthy; this implies that the board may have had some information of misconduct of an applicant which would justify a refusal to issue the certificate, or after the certificate

is issued that would justify its recall, and in either case the board is authorized to act 'after giving the accused an opportunity to be heard.' Those are the only words that suggest a trial and they fall far short of a judicial trial.* * *

* * * The duties of the board are of an administrative or ministerial character, and therefore as long as its acts are within the scope of the exercise of a reasonable discretion it is free to act."

on page 563 the court had this to say:

"In the case now before us for judgment we hold that the State Board of Health is not a judicial body, that it has the power to revoke a license or certificate issued by it if after investigation in which the licensee is afforded an opportunity to be heard it is satisfied that he has been guilty of unprofessional or dishonorable conduct, and that in conducting such investigation (or trial if that term is preferred) it is not assuming to exercise a judicial function; * * *

The Goodier Case supra, has been reaffirmed in the case of the State ex rel. Ball supra, l.c. 777, and State ex rel. Johnson v. Clark et al, 232 S.W., page 1031, l.c. 1034:

"As authority for such insistence the Attorney General cites State ex rel. McAnally v. Goodier, 195 Mo. 551, 93 S.W. 928. That case was an original proceeding in prohibition, brought against the State Board of Health to prohibit it from proceeding with a hearing upon charges preferred against the relator. This court there held that prohibition would not lie as the Board of Health is not a judicial body, but merely exercises ministerial functions.* * *

Having determined that the order of March 10, 1937, was purely ministerial in character, we shall next determine whether or not your present Board has authority and jurisdiction to set aside or modify said order, and if so, to what extent, if your Board in its decision determines that it so desires. In 34 C. J., Section 1293, we find this statement:

"Only decisions made in a judicial capacity operate as res judicata."

In the case of State ex rel. Plunkett et al v. Miller, 137 So. page 737, l.c. 738, the court had this to say:

"In the case of Moreau v. Grandich 114 Miss. 560, 75 So. 434, we held that under the school law an appeal from the trustees to the superintendent is not an exclusive remedy; that the right to admission to the public schools of the state is a valuable right upon which litigants have a right to judicial determination, that the school trustees and superintendent are administrative bodies, and that the appeals provided from them are administrative appeals, and do not constitute res adjudicata."

Financial Aid Corp. v. Ross Wallace et al, 125, A.L.R. page 736, l.c. 741, wherein the court said:

"* * *An administrative officer charged with the administration of the laws enacted by the General Assembly necessarily exercise a discretion partaking of the characteristics of the judicial department of the government but does not have the force and effect of a judgment. Unless an administrative officer or department is permitted to make reasonable rules and regulations, it would be impossible in many instances to apply and enforce the legislative enactments, and the good to be accomplished would be entirely lost.* * *"

In the case of Cornet et al. v. St. Louis County, 240 S.W. page 107, l.c. 112, the court had this to say:

"* * *While the Legislature may, perhaps, under some circumstances, impose upon the courts governmental or administrative duties for which their organization is peculiarly fitted, and while, in such matters, they may properly use their process to facilitate the performance of such duties, it is plain that the rendition of a judgment having all the incidents of judicial finality, while acting simply as a legislative agent in the levy of a tax, would be within the constitutional prohibition to which we have referred. Its act could have no other or greater force in such a case than would the act of a nonjudicial agent of the legislative department, and its failure to follow the legislative direction would have the same vitiating effect as the like failure of an administrative officer or agent charged by law with the same duty.* * *"

Rockwell Lime Co. et al. v. Illinois Commerce Commission et al, 26 N.E. (2d) page 99, l.c. 107, wherein the court said:

"* * * It may be observed, however, that a sufficient reason for not making a specific finding with respect to the defense of res judicata is that the Commerce Commission is a judicial tribunal and its orders are not judgments which are res judicata, but are subject to change by the commission when changed conditions warrant. Illinois Power & Light Corp. v. Commerce Comm., 320 Ill, 427, 151 N.E. 236."

In the case of Duel vs. State Farmers Mutual Automobile Company 1 N.W. (2d) 887, l.c. 895, the court said:

"* * * We do not consider that the doctrine of these cases goes any further than the following statement from the Penrose case, supra, indicates: '* * * no one will contend that a succeeding Commissioner could overrule or ignore the decisions of his predecessor, unless such decision were in law erroneous or tainted with fraud (mistake). Any other conclusion would bring chaos in governmental administration and cause untold annoyance to our citizens'.

"The extent of the power of an administrative body or agency to reconsider its own findings or orders has nothing to do with res adjudicata; the latter doctrine applies solely to courts. (Cases cited) Whatever limitations there are upon the right of an administrative agency to reconsider issues of fact involved in granting a license, a subsequent commissioner is not foreclosed from entertaining a different view of the law from that held by his predecessor. That is the situation here."

From the reading of the last cases supra, we see that the courts have been very reluctant to allow an administrative body to set aside or modify an order made by a predecessor board and have done so as far as we can find, only in cases where such decisions "were in law erroneous or tainted with fraud (mistake)". Duel vs. State Farmers Mutual Automobile Company supra. Or the Board has determined that there is a changed condition. Rockwell Lime Company et al, vs. Illinois Commerce Commission supra.

Now we shall view Section 9990 of which we have set out verbatim heretofore in this opinion, an attempt to ascertain the scope of authority given to the now present Board in the light of the instant question presented in your request. At the out-set it will be observed that the wording of the statute is very broad in that it empowers the Board through the use of the word "may" (which word is directive in meaning) with either discretion to "refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, * * *" We observe that said section uses the word "revoke" and does not at any place use the word "suspend" even though said section provides that:

"If a majority of the board are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. * * *"

It is our view that in cases where a Board fixes a definite period of time that said license may be held, the word "revoke" would be synonymous with the word "suspend", but in the order of March 10, 1937, we find that the Board in their discretion provided that the license should be "permanently revoked". Therefore, we must conclude that the Board no doubt intended that the word "revoke" should carry its regular definition meaning:

"Revoke: To call back; to recall; to annul an act by calling or taking it back." (Black's Law Dictionary)

However, we take occasion to quote from the case of Burns vs. State, 76 S.W. (2d) page 172; l.c. 173, the court had this to say:

"In view of the above, we naturally expect and do find it universally held that the disbaring of an attorney from the practice of law does close the door to his practice of law, but does not seal it. The prime object is to protect the people. Scott v. State, 86, Tex. 321, 24 S.W. 789, 790. It is a question of policy as to what will best aid in the administration of justice to the public. Almost all our common-law courts express the belief that the hope the disbarred attorney for restoration to the privileges of his profession, the realization that the government, which stripped his honors from him, desired him to shake off the shackles of his evil deeds, is consistent with and promotive of the

October 6, 1943

best government by the people as well as consonant with human happiness. The quality of such mercy 'blesseth him that gives and him that takes.' (Cases cited)

"It is argued that the judgment of 1929 is res adjudicata of the relief prayed for. It is true that, as respects pleading and jurisdiction and supersedeas and in general such procedural matters, a disbarment suit is a civil suit. (Cases cited). Its object is not punishment but rather to keep clean and efficient the machinery of government, machinery which, as far as differences of private citizens are concerned, is furnished by the government for the settlement of those differences. The interest of the government in such machinery is therefore different from the results of the operation thereof. So the reason for applying the rule of res adjudicata as the same exists in litigation of purely private rights not fraud, error, or mistake does not exist here. When the reason fails, the rule should fail. It is more analogous to those matters of public interest, such as welfare of children, insanity, etc., which the law allows to be relitigated as often as changed conditions make a different result probable."

* * * * *

" * * * Article 316, Rev. Statutes, says the judgment on disbarment may "revoke" the license 'entirely.' Revoke means to 'annul by taking back.' The license was taken back to its source, the Supreme Court. It could therefore by statute be issued only by the Supreme Court."

We have set out a lengthy quotation from the Burns vs. State case, supra, but wish to make the observation that in orders disbarring attorneys are generally made by courts or their agents and are distinguishable from an order made by ministerial agencies as in the instant case, for the reason that the courts have as a matter of law, certain inherent powers which do not exist in the case of the State Board of Health, and for that reason the effect of such orders are distinguishable, so it is our view that the reasoning used in the Burns Case, supra, would not be controlling in a situation as is presented in this opinion. However, it is our view that the definition given to the word "revoked" does afford some guidance, for it may be pointed out that the court in the Goodier Case, supra, made the word "revoke" by inference if not by direct statement synonymous with the word "recall". So if we are to give the word "revoke" in Section 9990 where a Board has "revoked" a license without stating a period of time then we must conclude that such license is for all intents and purposes "recalled" by the Board and the Board does not intend to

have any supervisory control of any character over the person or his actions who had previously enjoyed the privilege of a license. Therefore, it is our view that even if it were conceded that the order of March 10, 1937, would not act as a res judicata against the present Board, for the reason that the order of March 10, 1937, was purely "ministerial" as distinguished from "judicial" or "quasi judicial" and it must be conceded that the present Board entertains no doubt that the order of its predecessor Board was in law erroneous or tainted with fraud (mistake), and we have concluded heretofore in this opinion that it was our view that the Board after making the order "revoking" or "permanently revoking" the license, that they did not intend to exercise any further jurisdiction or control over the licensee, which would preclude in our opinion, any thought that the present Board had sufficient supervision to reinstate the old license on the theory that a changed condition had come about. Lastly, we make the observation that Section 9990 supra, that no place in said section contains any provision directly or indirectly, empowering a Board to reinstate a license which has been "revoked" in a sense of permanent revocation.

We wish to call attention to the definition of the word "license"

"A permit or authorization to do that what, without a license, would be unlawfull." 15 R.C.L. 247.

"To license means to confer upon a person the right to do something which otherwise he would not have the right to do."

"A license is in the nature of a special privilege, and not a right common to all." 17 R.C.L.474.

From a review of the authority and what we have heretofore said in this opinion, we see nothing to prevent Ludwig Orlando Muench from filing an application or petition original in character asking for a license to practice medicine. It is our view that the present Board would have the authority to treat his application or petition the same it would in the case of any other applicant or petitioner. In which event he would be governed and subjected to the same rules and regulations of the Board as any other applicant. The Board upon such application, would determine whether in their discretion he had met all of the requirements laid down by the Board and whether or not in their discretion he should be granted a license. If the Board saw fit to grant a license then such license would date from the time of granting same.

October 6, 1943

CONCLUSION

1) It is the opinion of this Department that the now present State Board of Health does not have jurisdiction and authority to entertain a petition for the purpose of reinstating the license to practice medicine and surgery which was "revoked" in the order of March 10, 1937, by the then Acting Board.

2) The use of the word "permanently" in connection with the word "revoke" in the order of March 10, 1937, was merely surplusage, for the word "revoke" must be construed to mean "a permanent revocation for all times". Ball vs. State Board of Health supra.

3) A permanent revocation of a license by a predecessor board does not prevent the present board, whose functions are ministerial in character, from entertaining an application for an examination and granting a new license if the applicant successfully passes such examination and otherwise qualifies. However, the applicant must conform to all present laws and rules and regulations of the board promulgated thereunder at such time existing. Such license, if any be granted, would be effective as of the date of its issuance.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

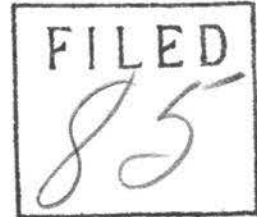
APPROVED:

ROY MCKITTRICK
Attorney-General

BRC:lr

MOTOR VEHICLES) Motor vehicles of Defense Plant Corporation not
LICENSES (subject to license fee. Motor vehicles leased
FEDERAL AGENCIES) or rented by Pratt-Whitney liable for tax. Fee
for title chargeable against Defense Plant Corp.
or Pratt & Whitney.

October 11, 1943



Mr. V. H. Steward
Commissioner of Motor Vehicles
Jefferson City, Missouri

Dear Sir:

We have yours of recent date wherein you make the following statement and request:

"This Department requests an opinion from your Office as to whether or not the Defense Plant Corporation, Kansas City, Missouri, and the Pratt & Whitney Aircraft Corporation, Kansas City, Missouri, are exempt from obtaining license plates and paying the license fee for the motor equipment that they use and operate in connection with the work and activities of their Corporation, and also as to whether or not they are required to pay the statutory \$1.00 fee for certificate of title."

The Missouri Statutes do not expressly exempt the United States Government and its Agencies from the payment of the Motor Vehicle license fees on cars owned and operated by the Government and its Agencies. However, since the ruling of the Supreme Court of the United States (1819) in the case of *McCullough v. State of Maryland et al*, 4 Law Ed. 579, the rule of implied exemptions from taxes on the Government and its Agencies has been recognized in various degrees. The rule is stated in 33 Am. Jur., page 334, Sec. 14, in this language.

"A state has no power to tax the means and instrumentalities which the Federal Government employs to carry on its proper functions."

The Supreme Court of the United States in 1928 in the case of *Panhandle Oil Co. v. State of Mississippi*, 72 Law Ed. 857, 277 U.S. 218, applied this rule and held that the State of Mississippi could not impose a tax measured by the quantity

October 11, 1943

sold upon the privilege of one of its citizens of selling gasoline to the Federal Government for the use of its Coast Guard Fleet or Veterans Hospital.

The courts have modified the above rule to some degree. For example in *Farmers and Mechanics Savings Bank of Minneapolis v. Minnesota*, 58 Law Ed. 706, the rule was stated that in some case a state may in some cases tax the property of a government instrumentality, but it could not tax the operation of such instrumentality employed by the Government of the Union to carry its powers into execution.

In the case of *Union Pacific R.R. Co. v. Peniston* 85 U.S. 38, 21 Law Ed. 787, 793, in applying this rule the Supreme Court of the United States said; l.c. 793:

"It is therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken (*37 to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

So in your case the motor vehicle tax being on the operation of the motor vehicle on the highways would be a tax on the operation of equipment. If such equipment belongs to the Federal Government or its agency in the performance of governmental functions it would be in violation of the foregoing rule.

The United States Supreme Court in 1941 in the case of *State of Alabama vs. King and Boozer et al*, 140 A.L.R. 615; 314 U.S. 1; 86 Law Ed. (adv. 1), 62 Section 43, held that a contractor with the United States Government on a cost-plus-fixed-fee contract was liable for the payment of the Alabama retail sales tax on lumber which he purchased to execute his contract. The wording of Article III of the contract then under consideration was similar to the wording in Defense

October 11, 1943

Plant Corporation which you have submitted. In the Alabama case supra the court in the above opinion dated in 1941 in stating the extent to which the rule of exemption as announced in the earlier cases had been modified said, l.c. 618, Vol. 140 A.L.R.:

* * * "The Government, rightly, we think, disclaims any contention that the Constitution, unaided by congressional legislation prohibits a tax enacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co.* supra, we think it no longer tenable." (Cases cited).

With these principles in mind we think that if the motor vehicles in question are owned and operated or operated by a lessee as an agent and instrumentality of the Federal Government in the execution of a public governmental function that the motor vehicle license tax may not be imposed.

Examining the correspondence accompanying your request we find that the motor vehicles in question are now owned by the Defense Plant Corporation, and that they were purchased from the Pratt & Whitney Aircraft Corporation, which was engaged in a cost-plus-fee contract with the Government for manufacturing government planes. The file also reveals that these motor vehicles while owned by the Defense Plant Corporation may be operated by Government employees in the future on Government contracts (letter dated August 31, 1943). The file also shows (letter dated September 6, 1943 from Defense Plant Corporation to Secretary of State) that these contracts are executed by the United Aircraft Corporation of Missouri as agent for Defense Plant Corporation as owner with the contractor to carry out a cost-plus-fixed-fee contract. This

October 11, 1943

contract by Article III as revealed in said letter reveals that the owner furnishes or pays the cost of tools, equipment and machinery to carry out the contract. This file, we think clearly reveals that the Defense Plant Corporation in the execution of these contracts is acting as an agent of the United States Government in executing a Government function and that as such it falls within the rule of exemption hereinbefore discussed. However, as to Pratt & Whitney's liability for the license on these cars, we think the license tax would be chargeable if Pratt & Whitney leases them for more than ten days. Sec. 8367, R.S. Mo. 1939, defines the term "Owner":

" 'Owner'. The term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively. * * *"

Pratt & Whitney is not such a Government Agency as to be exempt from this license tax.

As to the charge for the transfer of certificate of ownership, we do not think this rule applies, because this is a service charge and not a tax.

CONCLUSION

From the foregoing it is the opinion of this Department that motor vehicles owned and operated by the Defense Plant Corporation are not liable for the motor vehicle license tax. We are further of the opinion that motor vehicles leased and operated by Pratt & Whitney from the Defense Plant Corporation for a period of more than ten days are liable for the payment of the motor vehicle tax. And we are further of the opinion that both the Defense Plant Corporation and Pratt & Whitney are liable for the payment of the fee for the certificate of title to any car which they may own.

Respectfully submitted,

Tyre W. Burton
Assistant Attorney-General

APPROVED:

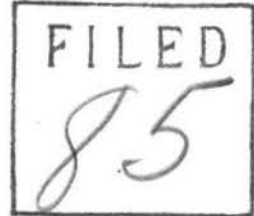
ROY MCKITTRICK
Attorney-General

TWB:ir

CITIES, FOURTH CLASS: May charge reasonable fee for use of sewers.

October 14, 1943

10-19



Dr. James Stewart
State Health Commissioner
State Office Building
Jefferson City, Missouri

Dear Dr. Stewart:

Under date of August 23, 1943, you wrote this office requesting an opinion as follows:

"There are many cities in this State having a population of less than one thousand that have been hampered in the proper operation and maintenance of their sewage treatment works by a lack of adequate funds. This is largely the result of a constitutional limitation on taxes for general purposes of twenty-five cents on the one hundred dollar valuation for cities of less than one thousand population as compared with fifty cents for cities of from one to ten thousand.

"In view of this difficulty and the desire for many cities to collect a 'sewer rental' or service charge to defray the cost of operating and maintaining their sewerage system and sewage treatment plant we should like to direct your attention to Chapter 38, Article 2, Section 6602, and Article 13, Section 7429, Revised Statutes of Missouri, 1939, and would appreciate your opinion as to the following points:

"1. Under the above or any other statutes would it be legal for a city of the first, second, third, or fourth class to collect a service charge from all residents connected

to and using the city sewers and/or sewage disposal plant for such service? Would any monies thus collected be paid into the general revenue fund or handled separately? Could an existing Board of Public Works handle such funds in a manner similar to the revenue from other utilities? Could a Board of Public Works be established under any existing statute for the purpose of managing and operating a sewerage system and/or sewage disposal plant or an incinerator?

"2. Could a portion of any funds collected as a service charge as indicated above, be set aside in a sinking fund for the repair or replacement of such works? Could such funds be used toward the retirement of general revenue bonds, or applied toward the annual payment for the purchase of sewage disposal plants, sewer systems or garbage incinerators?

"3. Could equipment or additional units for an existing sewage disposal plant be legally financed under the above statutes without the necessity of passing a bond issue? "

Later and after conference with Mr. Kerr of your office, under date of October 6th, it was requested that the opinion be limited to a discussion of the question with reference to cities of the fourth class.

In considering your questions, there are certain fundamental rules of law which must be borne in mind. Foremost of these is, that cities have none of the elements of sovereignty and cannot go beyond the powers granted them, and they must exercise the granted powers in a reasonable manner. City of St. Louis v. Weber, 44 Mo. 547, 1. c. 550.

Another of these fundamental rules is that cities have only such powers as are expressly granted to them, those powers which are necessarily implied as incident to the carrying out of the powers expressly granted, and those powers which are necessary to the carrying out of the objects and purposes of the

corporation. City of Neosho ex rel. v. Kelly, 52 S. W. (2d) 65; Ex parte Williams, 139 S. W. (2d) 485.

With these rules in mind we must consider the statutes which confer upon cities of the fourth class the power to construct sewerage systems and to establish boards of public works.

Section 7181, Article 9, Chapter 38, R. S. Mo. 1939, authorizes the construction of public sewer systems. Said section provides as follows:

"The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

Section 7182 of the same article and chapter, treats of district sewers, the construction of them and the manner of paying for them.

Section 7183 of the same article and chapter provides for the construction of private sewers at private expense.

In addition to these sections there is also Section 7429, Article 13, Chapter 38, referred to in your letter, which section provides as follows:

"In addition to all powers now possessed by cities of the second, third and fourth classes in this state for the protection of the public health, each city of the second, third, or fourth class of this state is hereby authorized and empowered to provide for the gathering, handling and disposition, either by itself, or by contract with others, for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities, and to pay for the same out of general revenues or by collection of charges for such service, and to do such other and further acts as may be deemed expedient for the protection and preservation of the public health, as such public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste; to acquire by purchase, construction, lease, gift or otherwise, within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means all equipment necessary or expedient for use in the collection, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities. Such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, may be acquired by such cities with funds derived from the issue and sale of bonds in the manner provided by law for the issue and sale of bonds for other public purposes; or such may enter into contract for the construction or purchase of such incinerator or incinerators, equipment or purification plant or plants or sewage disposal plant to be paid for out of the general revenues of such cities in annual installments: Provided, however,

that the period of payment for any such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, or any contract for the construction, purchase or lease thereof out of the general revenues of such cities shall not extend over a longer period of time than ten (10) years." (Underscoring ours.)

This section applies to cities of the second, third and fourth classes alike.

While Section 7429 does not treat solely with sewers and sewerage, it has provisions relating to these matters and these provisions must be considered along with other sections of the statute treating with the construction and maintenance of sewers, as all statutes must be considered together and meaning given to all of them and to each word of them.

In statutory construction the cardinal rule is to determine the legislative intent which caused the enactment of the law.

The foregoing are the statutes pertaining to sewers in cities of the fourth class.

Cities of the fourth class are authorized to establish boards of public works by Section 7796, Article 31, Chapter 38, R. S. Mo. 1939, and the powers and duties of such boards when they are established are set out in Sections 7799 and 7800 of the same article and chapter, which sections provide as follows:

(Sec. 7799)

"Whenever any such city mentioned in section 7796 shall have by ordinance established a board of public works, as herein provided, such board so established in such city, town or village shall, during the existence of such board, have the power, and it shall be its duty, to take charge of and exercise control over any water-works, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing

light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants."

(Sec. 7800)

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

In the foregoing sections of the statutes the only express grant of power which would seem to authorize the charging for the use of sewers or sewerage disposal plants, is the underscored portion of Section 7429, supra. In considering this language to determine the intention of the Legislature, attention is directed to the following clause of Section 655, R. S. Mo., 1939:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a

peculiar and appropriate meaning in law shall be understood according to their technical import; * * *

There are no technical words or phrases having a peculiar meaning in the underscored clauses. The first one is,

"and to pay for the same out of general revenues or by collection of charges for such service,"

The second one is,

"to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities."

These two clauses are contained in the same sentence. The first clause follows immediately after the words which authorize cities to provide for the handling and disposition of garbage, trash, cinders, refuse matter and municipal waste, and unquestionably relates to the matter of paying for those services. Upon a casual reading of the first part of this statute, it might appear that the words "refuse matter and municipal waste," would include sewage and that this would answer your first question as its terms are very broad and might be construed to include sewage and the disposal of sewage. However, inasmuch as later in the same sentence is found a clause relating to the disposition of sewage, it must not have been the intention of the Legislature that sewage should be included in the terms "refuse matter and municipal waste."

At this point it is considered advisable to call to your attention some definitions of the words "sewage" and "waste." In Vol. 39 of Words & Phrases (Per. Ed.) pp. 76, 77, we find the following definitions:

"'Sewage' is the general drainage of a city or town by means of sewers. City of Valparaiso v. Parker, 47 N. E. 330, 331, 148 Ind. 379.

* * * * *

"The word 'sewage,' in its secondary sense of usual character of contents of

sewer, signifies the refuse and foul matter, solid or liquid, carried off by sewer. Borough of Wilkinsburg v. School Dist. of Borough of Wilkinsburg, 148 A. 77, 80, 298 Pa. 193.

* * * * *

"'Sewage system' is for drainage of foul waters of community, and term 'sewerage' is often used to indicate anything pertaining to sewers. Pioneer Real Estate Co. v. City of Portland, 247 P. 319, 321, 119 Or. 1.

* * * * *

"Garbage, bones, parts of dead animals and other solid matter are not 'sewage' so as to authorize meat packing companies to turn such matters into channel of sanitary district of Chicago, but other trade wastes which are liquid or which may be diluted and oxidized by waters flowing in channel are properly designated as 'sewage' which may be turned into channel. Act of 1889, Secs. 7, 20, Smith-Hurd Stats. c. 42, Secs. 326, 341. Sanitary Dist. of Chicago v. Chicago Meat Packing Co., 241 Ill. App. 288."

And in Vol. 44 of Words & Phrases (Per. Ed.) p. 713, are found definitions as follows:

"'Refuse' is worthless matter, rubbish, scum, leavings, and the 'waste' of municipalities usually includes all wastes except garbage and ashes. Stern Holding Co. v. O'Connor, 196 A. 432, 119 N. J. L. 291.

"Standard lexicographers use 'refuse' as synonymous with 'waste.' Thus, Worcester: 'Refuse: (a) Left as worthless when the rest is taken; worthless; waste.' And one of the meanings given by him of 'waste' is 'refuse.' State v. Howard, 72 Me. 459, 465."

Under these definitions and because of the fact that the section makes separate and specific mention of sewage disposal, it is felt that the words "refuse matter and municipal waste" could not possibly be construed to include sewage. The clause of the sentence relating to purification plants or sewage disposal plants, contains the words, "to acquire by any of such means * * *," the only means previously mentioned in the sentence are, "out of general revenues or by collection of charges."

This would provide express authority for a charge for the use of sewage disposal plants, the disposal plants would only be used by the discharge of the contents of the sewage into them, which would make the charge in effect a charge for the use of the sewers. But it would not authorize a charge for the use of the sewers except for the purpose of acquiring and maintaining disposal plants.

This brings us to a consideration of Section 7181, R. S. Mo. 1939. The language of the statute is,

"* * * Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, * * *"

This language expressly authorizes the construction of sewers and the city, of course, under this express authorization, would have the implied power to maintain them and to make reasonable regulations regarding the use of its sewers.

In the case of Hill v. St. Louis, 159 Mo. 159, a case involving a fee fixed by ordinance for connection with the district sewer, where the property owner had not paid the special tax bill for the construction of a sewer, the Supreme Court held the fee could be collected. In this instance the city had been given express authority to regulate the use of sewers.

As a city of the fourth class has the implied power to maintain its sewers and to regulate the use of them, it would have the power to do the things necessary to maintain them and control the use of them. Under this power the city might then have power to fix a reasonable charge for the use of sewers.

Opposed to this view, it might be urged the charging of a fee for the use of something which had been constructed with

Oct. 14, 1943

money raised by taxation, would be in the nature of double taxation. But the charge would not be for the construction but would be for an entirely different purpose - for the use of the sewers.

In regard to the disposition of any moneys that might be realized by a charge for the use of sewers, there is no statutory provision which would require such moneys to be segregated and used only for the purpose of maintaining the sewer system. Fees of this nature would be similar to fees received for electricity and water in towns operating municipal water or light plants and paid into the general revenue fund. The city might, of course, enact an ordinance segregating any such fees collected, to be used in maintaining the sewers. But if such an ordinance was enacted it could be repealed at any time and throw the funds into the general revenue fund.

A board of public works could have only such powers as might be given to it by the ordinance creating it and in accordance with Sections 7799 and 7800, R. S. Mo. 1939, heretofore set out, which sections authorize the creation of such boards and define the limits of the power which may be given to them.

In the foregoing no attempt has been made to treat fully and in detail the matters discussed, as it is thought that a treatment of matters of this kind in detail properly belongs to the cities, and this department has no desire to infringe upon the powers and duties of the legal departments of the various cities. Should the foregoing general discussion of this matter be inadequate, this office will be glad to go fully into the details of any problem which may confront your office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

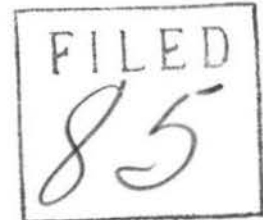
ROY MCKITTRICK
Attorney-General

WOJ:EG

MOTOR : : Construing H. B. 240 passed by 62nd General
VEHICLES : : Assembly. Commissioner of Motor Vehicles
: : shall register motor vehicles by gross
: : weight, which includes vehicle and load.
: : Fees for registration to be collected and
: : accounted for by Commissioner and credit
: : for 85% of such fees to be allowed by Public
: : Service Comm. in applying for permit to haul
: : persons or property for hire.

October 28, 1943

Honorable V. H. Steward
Commissioner of Motor Vehicles
Jefferson City, Missouri



Dear Mr. Steward:

Your request for a construction of House Bill
No. 240, omitting caption and signature, reads as
follows:

"This department kindly requests an
opinion from your Office in regard
to the registration of commercial motor
vehicles and trailer equipment, as ap-
plies to the matter of license fees and
the manner in which such units shall be
licensed, as provided for in House Bill
No. 240 passed by the 62nd General As-
sembly of Missouri."

Briefly stated, House Bill No. 240 is:

"AN ACT

"To repeal Section 8369, 8370, 8405 and
8406, Article 1, Chapter 45, Revised
Statutes of Missouri, 1939, relating
to the regulations and license fees of
motor vehicles, and enacting in lieu
thereof four new sections relating to
the same subject matter to be known as
Sections 8369, 8370, 8405 and 8406, with
an emergency clause, which reads as follows:

"Section 2: The General Assembly hereby
declares this Act is necessary for the
preservation of the public peace, health,
safety, and general welfare, and an emer-
gency exists within the meaning of the
Constitution, and this Act shall become
effective upon passage and approval."

Formal approval of this Act was given on May 23, 1943, at which time, under the Constitution the same became effective.

Directing our attention to three sections upon which, from personal conversation with members of your staff, a construction is deemed advisable, we find at new Section 8369, this language:

"(c) Registration fees made payable to the State Treasurer shall be remitted to the Commissioner with the application for registration for the remainder of the calendar year on the basis of the license fees now provided by Section 8369 and Section 8370, Revised Statutes of Missouri, 1939; the license fees provided by this Act shall become effective on and after January 1, 1944.

"For motor vehicles other than commercial motor vehicles and motorcycles and motortricycles.

Less than 12 horsepower	\$ 5.00
12 horsepower and less than 24 horsepower	8.50
24 horsepower and less than 36 horsepower	11.00
36 horsepower and less than 48 horsepower	20.00
48 horsepower and less than 60 horsepower	25.00
60 horsepower and less than 72 horsepower	31.50
72 horsepower and more	37.50
Motorcycles	6.00
Motortricycles	7.50

"For commercial motor vehicles having a gross weight of:

Under 1,500 pounds	10.00
1,500 pounds to 10,000 pounds	15.00
10,000 pounds to 12,000 pounds	20.00
12,000 pounds to 18,000 pounds	30.00
18,000 pounds to 20,000 pounds	40.00
20,000 pounds to 22,000 pounds	50.00

22,000 pounds to 28,000 pounds	\$ 65.00
28,000 pounds to 32,000 pounds	100.00
32,000 pounds to 38,000 pounds	125.00
38,000 pounds to 42,000 pounds	150.00
42,000 pounds to 44,000 pounds	175.00
Over 44,000 pounds	200.00

The enactment of 1943, made the important move which changed subdivisions (c) in this respect: Registration fees for commercial motor vehicles under the new act provides that fees for such vehicles should be on the basis of "gross weight" of vehicle rather than "tonnage capacity", and further that

"For each trailer or semi-trailer there shall be paid a fee of three dollars (\$3.00). The fees for tractors used in any combination with trailers or semi-trailers or both trailers and semi-trailers shall be computed on the total gross weight of the vehicles in the combination with load.

"The annual license fee required by this article is intended to cover only the motor vehicle for which it is issued; the Commissioner may, however, on application, when a licensed motor vehicle has been destroyed or replaced by another motor vehicle of the same licensed weight or less, transfer said annual license: in cases where the substituted vehicle is of larger gross weight, the applicant must pay an additional sum equivalent to the difference between the annual license fee for the original motor vehicle and the annual license fee for the substituted motor vehicle."

From our reading of the above we conclude that the \$3.00 fee for each trailer or semi-trailer and the fees for the tractors used in any combination with trailers or semi-trailers- the basis of computation shall be on "total gross weight of vehicles in combination with load" is a mandatory duty.

However, the latter paragraph of this section imposes but a discretionary authority for it provides "the Commissioner may, however, on application, when a licensed motor vehicle has been destroyed by another motor vehicle of same licensed weight, or less, transfer said annual license."

It is the obvious intent of the Legislature to leave to the discretion of the Commissioner certain transfers; and in the fees prescribed in the instance of the first paragraph he has no discretion and his duties are therefore confined necessarily to the express language of the statute.

Turning our attention now to a portion of the same Section 8369 as approved May 22, 1943, we find this language with respect to fees for commercial motor vehicles:

"Eighty-five (85) per cent of such registration fees shall be credited against any fees charged by the Public Service Commission of this State for the transportation of persons or property. "

The question now arises as to whether the applicant shall remit such fees to the Commissioner of Motor Vehicles or to the Public Service Commission where the permission to operate involves transportation of persons or property.

It would seem the clear intent of the Legislature to have an owner seeking registration of a motor vehicle to "cause to be filed, in the office of the Commissioner, an application,--" together with other requirements contained in paragraph (a and b) and continuing to paragraph (c). "Registration fees made payable to the State Treasurer shall be remitted to the Commissioner with the application for registration," ----- and with the further provision that the "license fees provided by this Act (referring to Secs. 8369-8370, R. S. 1939) shall become effective on and after January 1, 1944.

Under this situation, as we view it, the Commissioner of Motor Vehicles is under a mandatory duty to receive applications of the owner, account for these funds, and to receive credit for having collected same.

The further fact, that prior to the issuance of a permit for public convenience and necessity by the Public Service Commission,-- an applicant must

present his receipt of the Commissioner in order to receive credit (up to 85%) of fees so paid the Commissioner, coupled with the knowledge that the ultimate destination of these funds is for construction, maintenance, and operation of the State Highway System, to be administered by the Highway Department, is added proof of the legislative intent. We believe the terms of the Act are clear on this point and are unambiguous and that no further construction on our part is necessary.

Confining our attention to the last eight paragraphs of Section 8369 we find this language:

"License taxes may be levied on motor vehicles by municipalities of this state provided that the fees charged by municipalities for said license shall not exceed the amount authorized therefor by said municipalities during the year 1933.

"For each local commercial motor vehicle there shall be paid a fee equal to one-third of the fee specified above for other commercial motor vehicles, provided, however, no vehicle fee shall be less than \$10.00.

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, Revised Statutes of Missouri, 1939, while operating within this state and used for the transportation of persons or property:

1. Wholly within any municipality or urban community, or
2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or

3. In making hauls not exceeding 25 miles in length, or
4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or live stock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms.

Each commercial vehicle shall prominently display in a conspicuous place on said vehicle the name of the owner thereof, the address from which such motor vehicle is operated and the weight for which said motor vehicle is licensed; provided further, that local commercial vehicles, in addition to the above information, shall prominently display on such vehicles in a conspicuous place the word "Local".

It is the prerogative of the Legislature to classify property for the purpose of taxation. Placing trucks engaged in commercial freighting on regular time or route schedules in one class and all other trucks using the public highways in another amounts to a legislative finding that there was sufficient difference in the use made of the public highways to justify the difference in the classifications and the courts cannot say that there is no basis of fact for the finding. (Raymond V. Holm, 165 Minn. 215, 206 NW 166-1925)

It is correct to say that highways are open to all upon equal terms, where used for purely private purposes but the statutes don't apply to question of classification for purposes of tax for privilege of using them. (Eavey Co. v. Department of Treas. of Ind. 216 Ind. 255--24 N E 12--268-1939.

The control and regulation of motor vehicles and questions bearing on the interpretation of statutes and regulations as they apply thereto has been discussed in numerous decisions in this state and we cite the following:

State ex rel, Public Serv. Comm. v. Blair, 146 SW 2,865-- 347 Mo. 220

State v. Sanderson 128 SW 2, 277 L.C. 279
State ex rel, Ill., Greyhound V. Public Serv.
Comm. 108 SW 2, 116--341 Mo. 190, 115, A.L.R. 1097
City of St. Louis V. Temples 149 SW 2, 888.

In State ex rel, Public Service Commission v.
Blair, 146 SW 2, 865 lc. 873, in the opinion of Judge
Clark we find:

"*** Of course, we realize that Missouri cannot grant permission for operations outside the State in the sense that such permission will be binding on another State, but Missouri can refuse to charge a tax for the use of our own highways although the carrier operates within a limited sphere outside the State, provided the carrier otherwise comes within the exemption proviso. Any other construction would discriminate against the many border cities and in favor of the interior cities of our State. The natural trade territory of many of our border cities extends across the State line and the practical necessities of commerce demand a unified system for the transportation of both passengers and freight in such territory. Nor do we think that to construe the term 'suburban territory' so as to include territory outside the State would be unconstitutional, although it would exempt some interstate operators and tax others. The Act has nothing to do with the residence of the owners of transportation systems; it treats resident and non resident owners exactly alike. It does make a distinction based upon the location of the major portion of the system. We think such distinction is reasonable. If the major part of the system is located in a municipality in this State, such municipality may provide reasonable measures for the dimensions, weight and safety equipment of the vehicles, the qualifications of the operators and the financial responsibility of the owners. If the system is located outside the State, but uses our roads or streets for commercial purposes, it comes within the jurisdiction of our Public Service Commission and subject to the

regulations and tax provided for all who do business in the same way.***"

See also State v. Sanderson, 128 SW (2) 277 1c. 279:

"We think there can be no serious question but that the highways belong to the state, and their use for purposes of gain may be regulated and restricted as the legislature deems proper, and that the legislature was within its right in passing laws regulating common carriers and contract haulers as was done in this instance. State v. Dixon, 335 Mo. 478, 73 SW 2d. 385, 387; Park Transportation Co. v. Mo. State Highway Comm., 332 Mo. 592, 60 S.W. 2d 388, 390. "****

and in State ex rel Ill, Greyhound v. Public Service Commission, 108 SW 2d. 116, 1c. 119:

"**** The highways belong to the state. It may make provision appropriate for securing the safety and convenience of the public in the use of them. Kane v. New Jersey, 242 U.S. 160, 37 S. Ct. 30, 61 L.Ed.222. It may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided, Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385. See, also, Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 44 S. Ct. 251, 68 L. Ed. 593. With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles -- particularly the large ones commonly used by carriers for hire -- promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject.' Buck v. Kuykendall, 267 U. S. 307, Loc. Cit. 314, 45 S. Ct. 324, 325, 69 L. Ed. 623, 38 A. L. R. 286.

The case was tried in the court below before the Federal Motor Carrier Act of 1935 (15 U. S. C. A. Sec. 77 (c); 49 U. S. C. A. Secs. 301-327) became effective, therefore, we will not undertake to decide if that act has in any way modified the Missouri Bus and Truck Act of 1931.***"

Looking now to Sec. 8370 and that portion which reads:

"*** Fees of commercial motor vehicles shall be based on the gross weight of the vehicle or any combination of vehicles and the maximum load to be carried at any one time during the license period."

"Gross weight" is defined by various authorities as follows:

Funk and Wagnall Standard Dictionary, 1937 unabridged edition.

"Gross Weight"-- the full weight of goods, no allowance being made for tare, tret, or waste; opposed to net weight.

Websters International Dictionary:

"Gross Weight" All parts taken together .

Citing Hawley V. James
16 Wendell N.Y.-61

Bouviers Law Dictionary

"Gross Weight" -- Entire weight.

The decisions in our own as well as other states are in agreement that a statute imposing on Motor vehicles carriers a highway maintenance tax fixed on the carrying capacity of the vehicle, the Commissioner of Motor Vehicles in computing the tax may use this method, i. e., maximum load, rather than the factory rated capacity since the maximum load has a direct relationship to the wear and tear on the highways.

A fee graduated according to the weight of the vehicles is constitutional and valid.

Prouty v. Coyne 55 F (2) 289
Louis V. Boynton 53 F. (2) 471
State v. Ry. Comm. 220 NW 390

The sizes and weights of motor vehicles includes sizes and weights of the motor vehicles and their loads.

Mauer v. Hamilton 309 U. S. 598
84 L. Ed. 969
60 S.C. 726

C O N C L U S I O N

From the above and foregoing we conclude that under the provisions of House Bill No. 240, which was approved May 22, 1943.

1. That registration fees of trucks, trailers, semi-trailers, etc., under the new section shall be computed on the "Gross Weight" rather than the "tonnage capacity" of a motor vehicle.
2. "Gross Weight," means the gross weight of the vehicle or any combination of vehicles and the maximum load to be carried at any one time during the licensed period.
3. That under section (c) of Sec. 8369 R. S. as enacted in 1943, the Commissioner of Motor Vehicles has a mandatory duty to collect fees as stipulated in the above section, but he has a discretionary duty with respect to licensed motor vehicles destroyed and replaced by another in allowing a transfer of annual license.
4. That the Commissioner of Motor Vehicles shall collect and account for registration fees as

Hon. V. H. Steward

-11-

October 28, 1943

required under part (c) Sec. 8369 R. S. enacted 1943, and that the Public Service Commission shall credit 85% of such registration fees so paid the Commissioner of Motor Vehicles, against any fees charged by the Public Service Commission for the transportation of persons or property.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

LIM:LeC

OFFICERS: (1) Prosecuting Attorney of the City of St. Louis has only jurisdiction concurrent with the St. Louis Court of Criminal Correction; (2) It is the duty of the Circuit Attorney of the City of St. Louis to enforce the provisions relative to the State Food and Drug laws.

November 19, 1943

11/24



James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri

Attention: Mr. W. D. Cruce, Supervisor
Division of Food and Drugs

Dear Sir:

The Attorney General wishes to acknowledge receipt of your letter of October 23, 1943, in which you request an opinion of this department. This letter, omitting caption and signature, is as follows:

"I am enclosing a copy of a letter from Mr. Thomas M. Gioia, Associate Prosecuting Attorney of the City of St. Louis. I would like your opinion in this matter as to what court and what prosecutor would have jurisdiction over both our new Food and Drug Laws and the old Food and Drug Laws, since the merchandise in question was in commerce within the State of Missouri while the old laws were in effect.

"By the direction of the Commissioner."

The principal question which your request contemplates is as to what official in the City of St. Louis shall perform the duties required of the prosecuting attorney under Article I, Chapter 58 of the Revised Statutes of Missouri for 1939, in the City of St. Louis, Missouri. Consequently, we will examine the statutes relating to the prosecuting attorneys and the jurisdiction of the Criminal Court of Correction of St. Louis.

We first wish to call your attention to Section 9859, R. S. Mo. 1939, which is in Chapter 58 aforesaid, and which provides the following:

"It shall be the duty of the prosecuting attorney in any county or city in the state, when called upon by the commissioner, or any of his assistants, to render any legal assistance in his power to execute the laws and to prosecute cases arising under the provisions of this article."

Obviously it is the duty of the prosecuting attorneys of the various counties to enforce the provisions of Chapter 58, supra, in their respective counties.

The St. Louis Court of Criminal Correction is a court exercising criminal jurisdiction in the City of St. Louis. The jurisdiction of this court is provided for in Section 2253, R. S. Mo. 1939, which section provides as follows:

"Said court shall have exclusive original jurisdiction of all misdemeanors under the laws of the state committed in St. Louis city, the punishment whereof is by fine, or imprisonment in the county jail, or both, or by forfeiture, except cases of assault and battery, and affray, or riotous disturbance of the peace, which are cognizable by justices of the peace, and in relation to which the jurisdiction of said court shall be concurrent with them; and the said court shall have concurrent jurisdiction with the police court of the city of St. Louis of all offenses which may be declared to be misdemeanors under any law of the state, and which may also be in violation of any ordinance of the city of St. Louis: Provided, that any action pending or which has been decided in either of said courts may be pleaded in bar or abatement, as the case may be, to a prosecution in the other of said courts for the same offense, with the like effect as if said prosecution were pending in the same court, or had been decided in the same court: Provided, that this law shall not be so construed as to give to said police court jurisdiction of any prosecution for a misdemeanor instituted in the name of the state of Missouri. It shall be the duty of the chief of police of said city to report within twenty-four hours after

arrest by the police, to the assistant prosecuting attorney of said court of criminal correction, the names of all persons charged with misdemeanors under the laws of this state, together with prosecuting witness and the names and residences of all other material witnesses in such case, which report shall be received by said assistant prosecuting attorney, and he shall thereupon proceed to institute such prosecution as required by law; and willful failure on the part of said chief of police, or other officer whose duty it shall be to act in the premises, to comply with the provisions of this section, shall be deemed a misdemeanor, whereof the party offending may be indicted and punished by a fine of not less than ten or more than one hundred dollars, any law of this state or any ordinance of the city of St. Louis to the contrary notwithstanding."

It will be noted from the above statute, and also from the other provision relative to the St. Louis Court of Criminal Correction, that this court only exercises criminal jurisdiction and has no jurisdiction of civil matters. The Prosecuting Attorney of the Court of Criminal Correction for the City of St. Louis is an officer of this court and is elected under and by virtue of the statutes pertaining to such court, and is spoken of specifically in Section 2240, R. S. Mo. 1939, which prescribes as follows:

"At the general election, every four years, there shall be elected by the qualified voters of St. Louis city a judge and clerk of said court, and a prosecuting attorney, to be styled the prosecuting attorney for the St. Louis Court of criminal correction of St. Louis city. Said judge shall possess the qualifications of a judge of the circuit court, and shall hold his office for the term of four years from the time of his election, and until his successor shall be duly elected and qualified, unless sooner removed from office. Said clerk shall possess the qualifications of a clerk of the circuit court, and be subject to all the requirements and obligations exacted of and imposed by

law upon clerks of courts of record, and shall hold his office for the term of four years from the time of his election, and until his successor shall be duly elected and qualified, unless sooner removed from office; and said clerk shall have power, by and with the consent of the judge of said court to appoint one or more deputies, which said appointment shall be approved by said court; thereupon said court shall fix the salary of said deputy or deputies, and said salary or salaries shall be paid monthly by the city of St. Louis. Said prosecuting attorney shall possess the same qualifications as required by law for circuit attorneys; he shall hold his office for the term of four years, and until his successor shall be duly elected and qualified, unless sooner removed from office."

From the foregoing section of the statutes, we wish to call your attention to the fact that the prosecuting attorney is styled "the prosecuting attorney for the St. Louis Court of Criminal Correction." It would appear to us that this office has jurisdiction concurrent with the court for which he is an officer and in view of the fact that the St. Louis Court of Criminal Correction has no civil jurisdiction, it is the opinion of this department that the Prosecuting Attorney of the St. Louis Court of Criminal Correction likewise has no civil powers but may only exercise the authority granted him as an officer of this particular court, the jurisdiction of which is purely criminal.

Since we have taken the view above, the question then is as to what officers will have the duty of enforcing the provisions of Chapter 58, supra, relating to the food and drug department in the City of St. Louis. It is, of course, common knowledge that all of the counties in the State of Missouri have prosecuting attorneys to exercise all of the duties relative to criminal actions in their respective counties, and, with the exception of two counties, they all represent their respective counties in any civil action in which it may be interested. However, in the City of St. Louis the statutes provide for an election of a circuit attorney. The section of the statute providing therefor is Section 12906, R. S. Mo., 1939, which prescribes the following:

"At the general election to be held in this state in the year 1892, and every four years thereafter, there shall be elected in the city of St. Louis one circuit attorney, who shall reside in said city, and shall possess the same qualifications and be subject to the same duties that are prescribed by this article for prosecuting attorneys throughout the state, and it shall be the duty of the city register of said city to transmit to the secretary of state an abstract of the votes given for each candidate for circuit attorney in said city, in the same manner as is required by law of clerks of county courts."

The procedure outlined in your request is of course provided for in Section 9860, R. S. Mo. 1939. This section of the statute is very long and consequently we will not set it out verbatim in this opinion. However, it provides that when goods are misbranded or adulterated, such food may be condemned and disposed of in the manner provided in such statute. There can be no doubt but that such an action would be strictly a civil proceeding and in view of the fact that the St. Louis Court of Criminal Correction has only criminal jurisdiction, the "Prosecuting Attorney of the St. Louis Court of Criminal Correction" would not have authority to act in the particular situation set out in your request.

It will be noted from Section 12906, *supra*, that the circuit attorney shall "possess the same qualifications and be subject to the same duties" as the prosecuting attorneys throughout the state. The authority of the circuit attorney of the City of St. Louis to prosecute civil actions was discussed in the case of *State ex rel. Jones v. Howe Scale Co.*, 182 Mo. App. 658, 166 S. W. 328. In this case the court said:

"Manifestly the circuit attorney is charged with the duty of prosecuting this civil suit under Section 1007, for the duties of the Prosecuting Attorney of the City of St. Louis are carved out so as to relate alone to matters falling within the purview of the Court of Criminal Correction."

November 19, 1943

In view of the above decision, we feel that the Prosecuting Attorney of the St. Louis Court of Criminal Correction does not have jurisdiction to prosecute or institute a civil proceeding of the kind in question. We further feel that the Circuit Attorney of the City of St. Louis is in the same position as the prosecuting attorneys in the various counties, in that in matters of a civil nature such as the instant one, it is his duty to institute and prosecute such suits.

This department might further add that in the prosecution of misdemeanors provided for in Article I, Chapter 58 of the Revised Statutes of Missouri for 1939, it is our opinion that either the Prosecuting Attorney of the St. Louis Court of Criminal Correction or the Circuit Attorney of the City of St. Louis would have jurisdiction to file and try such misdemeanor cases since both officials have criminal jurisdiction.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JSP:NH

CONSTITUTION CONVENTION: Method of nominating
delegates to the Constitutional
Convention.

February 16, 1943



Mr. E. G. Sullivan
Chairman
Jackson County Democratic Committee
1001 Gloyd Building
Kansas City, Missouri

Dear Sir:

We are in receipt of your letter of February 12, 1943, in reference to the selection of delegates to the Constitutional Convention from the Fifth and Seventh Senatorial Districts of Jackson County, Missouri.

In reply to the same, we are submitting the following:

Section 11575 R. S. Missouri, 1939, reads as follows:

"The county committee, or city committee, as the case may be, shall be composed of the committeemen and committeewomen elected in the several townships, or voting districts, at the August primary next preceding, and shall meet at the county seat of the several counties of this state, and at such place in any city not within a county as the chairman of the then city committee may designate, on the third Tuesday in August of the year in which the primary election is held, and organize by the election of one of its members as chairman, and one of its members as vice-chairman, one of

whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the committee." (Underscoring ours.)

The above section applies to all counties. Under this section a county committee shall consist of a committeeman and committeewoman, elected in the several townships or voting districts in the August primary, and shall meet at the county seat of the several counties of this State and designate one of its members as chairman, and one of its members as vice-chairman. One of whom shall be a woman.

Section 4848 R. S. Missouri, 1919 was passed upon in the case of State ex rel Kimbrell v. Becker, 237 S. W. 117. In that case the senatorial committee of the Fifth and Seventh Districts in Jackson County was involved. The court in that case held that Section 4848 R. S. Missouri, 1919 was not applicable to Jackson County. The decision in that case was en banc on January 14, 1922.

Section 4848 R. S. Missouri, 1919, was repealed by the Laws of 1923, page 197, and was re-enacted into what is now Section 11576 R. S. Missouri, 1939.

Section 11576 R. S. Missouri, 1939, is applicable to Jackson County, by reason of the fact that it applies to counties having more than one legislative district, - that is, senatorial district.

Section 11576 R. S. Missouri, 1939, partially reads as follows:

"In all counties of this state now, or hereafter, having more than one legislative district, in addition

to the county chairman and vice-chairman, as provided in section 11575, there shall be elected a chairman and a vice-chairman, one of whom shall be a woman, for each such legislative district, and the county committee and legislative district committees shall each at the same time elect a secretary and a treasurer; one of whom shall be a woman, but who may, or may not be, members of said committee, and the chairman and the vice-chairman so elected shall by virtue thereof become members of the party congressional, senatorial, and judicial committees of the district of which their county is a part: * * * * ."
(Underscoring ours.)

Under the above section the chairman and vice-chairman, as set out in Section 11575, supra, and the chairman and vice chairman for each senatorial district so elected shall by virtue thereof become members of the senatorial districts of which Jackson County is a part.

The following rule has been set out in 20 C. J. Page 104, Section 90, as follows:

" * * * In the absence of constitutional or statutory provisions to the contrary, the authorities of a political party, such as state and county executive committees may, in accordance with party usage, make and enforce reasonable regulations relating to nominations within the party; and some statutes regu-

lating the mode of nominations, except nominations for certain local offices, provide that they shall be made in the manner prescribed by party committees. * *"
(Underscoring ours.)

It will be noticed under the above rule that the committee may make reasonable regulations relating to the nominations within the party. However, in this State we have a constitutional provision which sets out the manner in which the delegates to a constitutional convention shall be nominated. This section is Section 3, Article XV of the Constitution of Missouri, which partially reads as follows:

" * * * The electors of each senatorial district of the state, as then organized, shall elect two delegates as herein provided at such election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large, such election to be conducted as provided by law; and each delegate shall possess the qualifications of a senator; and no person holding any other office of trust or profit (national guard officers, school directors, justices of the peace and notaries public excepted) shall be eligible to be elected a delegate to the convention nor during the term for which he shall have been elected or appointed. In order to secure representation from different political parties in each senatorial district, each political

party as then authorized by law to make nominations for the office of state senator in each senatorial district shall nominate only one candidate for delegate from such senatorial district, and such candidate shall be nominated in such manner as may be prescribed by the senatorial committee of the respective parties, and a certificate of nomination shall be filed in the office of the secretary of state at least thirty days before such election, and such candidate shall be voted for, each on a separate ballot with emblem or party designation, and each elector shall have the right to vote for one of such candidates, and the two candidates receiving the highest number of votes in each senatorial district shall be elected; * * * * * ."
(Underscoring ours.)

In the above partial section the following appears:

"* * * and such candidate shall be nominated in such manner as may be prescribed by the senatorial committee of the respective parties,
* * * * * ."

It particularly states in such manner, and does not say or prescribe a reasonable manner. For that reason it is purely in the discretion of the committee as to the manner they may prescribe for the nomination of delegates to the constitutional convention. This partial section is self-enforcing, for the reason that the legislature is not required to pass any legislation to permit a

senatorial committee to nominate a delegate by any particular manner. That such a section of the Constitution is self-enforcing was held in the case of *State ex inf. Norman, Pros. Atty., v. Ellis*, Circuit Court Clerk, 28 S. W. (2d) 363, 1. c. 365, where the court in upholding the rule as stated in 12 C. J., Page 729, said:

"The general rule is thus stated in 12 C. J. p. 729:

"It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed."

"And further, page 730:

"A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficiency and operation on the legislative will." * * * * *

The legislature cannot interfere with the power of the senatorial committee in prescribing the manner of the nomination of delegates to the constitutional con-

vention for the reason that this section of the Constitution which is an amendment to the original Constitution is a limitation on the legislature and not a grant of legislative power in any manner, and therefore the legislature cannot enact any law which would prohibit the senatorial committee in providing any manner for the nomination of delegates to the constitutional convention. It was so held in *State ex rel Gaines v. Canada*, 113 S. W. (2d) 783.

The above and foregoing part of Section 3, Article XV of the Constitution of Missouri was adopted November 2, 1920, and appears in the Laws of Missouri, 1921, Page 711. It is a late amendment and the people of this State have granted that power to the senatorial committee which is in unambiguous language, and needs no construction, other than that the senatorial committee may use any manner which, in its discretion, it deems proper. That it was the will of the people, and is unambiguous was held in the case of *State ex Inf. McKittrick, Atty. Gen., v. Bode*, 113 S. W. (2d) 805, 1. c. 808, where the court said:

" * * * We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' In other words, we are without authority, absent an ambiguity, to resort to interpolation.
* * * * *

It has been suggested that the senatorial committee, upon convening, might adopt a resolution making the committeeman from each ward of Kansas City the repre-

representative of the political party, for such ward, to a convention in such senatorial district, for the purpose of making the nomination. The above portion of Section 3, Article XV of the Constitution of Missouri, specifically states that such candidate shall " * * * be nominated in such manner as may be prescribed by the senatorial committees of the respective parties, * * *." Under this partial section such a procedure could be followed by a resolution or vote of a majority of the senatorial committeemen. Again it has been suggested that all the senatorial committee might do is to prescribe a method of procedure, and such procedure shall be either a primary or convention in which the members of a political party have a voice. Under the portion of Section 3, Article XV of the Constitution of Missouri, mentioned above, we find no limitation to the manner in which the committee may act. It is also suggested that the committee may be considered as limited to merely prescribing a method that should be employed. However, in reading Section 3, of Article XV of the Constitution of Missouri, we find that it states that the candidate shall be nominated in such manner as may be prescribed by the senatorial committee.

The question is also asked: Whether or not a resolution of the committee designating the committeemen from each ward or township as delegates to a convention, for each senatorial district is proper procedure. In view of our conclusions above set out, the committee can be so authorized. It has also been suggested that the ward committeemen in cities, or the township committeemen outside of the cities, may be the official representatives of the political party, and that the senatorial committee could prescribe the convention method, then, upon determining such method, designate the party committeemen from each ward or township, as the representatives of the party to such convention, charged with the nomination of the delegate.

In view of our above conclusions such a procedure would come within the above partially quoted Section 3, Article XV, of the Constitution of Missouri, which does not limit the manner of the nomination of the candidate to the constitutional convention.

After the delegates have been nominated under Section 3, Article XV of the Constitution of Missouri, a certificate of nomination shall be filed in the office of the Secretary of State, at least thirty days before such election. This certificate must conform to Sections 11525 and 11526 R. S. Missouri, 1939, which state that the certificate of nomination must be executed with the formalities prescribed for the execution of an instrument affecting real estate, and also the certificates must bear the name of the political party of which the nominee is a representative.

CONCLUSION

It is, therefore, the opinion of this department, that each political party authorized by law to make nominations for the office of state senator in each senatorial district shall nominate a candidate as a delegate to the constitutional convention from such senatorial district, and such candidate shall be nominated in any manner that may be prescribed by the senatorial committee of the respective parties.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

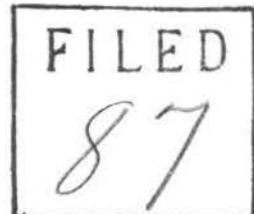
WJB:RW

HOUSE BILL NO. 45:

Does not include Osteopaths.

March 25, 1943

3-30



Mr. W. W. Sunderwirth
Senate Chamber
Capitol Building
Jefferson City, Missouri

Dear Mr. Sunderwirth:

Under date of March 22, 1943, your wrote this office
requesting an opinion as follows:

"I would like to have an opinion as to
the rights and duties of Osteopaths in
reference to House Bill No. 45. I am
attaching a copy of this bill and wish
to have an opinion as to the right of
an Osteopath to provide the certifi-
cate referred to in Section 1, Line 9,
of House Bill No. 45 in the light of
Section 10046 of Revised Statutes of
Missouri, 1939.

"This bill is up for hearing today. I
would like to have an opinion as soon
as possible. I will try to get the
bill laid over until tomorrow awaiting
your opinion."

There is no line 9 of Section 1 in House Bill No.
45. On page 2 of House Bill No. 45, line 9, the word
"physician" is found. This is in the proposed new Sec-
tion 3364A. The clause in which the word is found is
here quoted:

March 25, 1939

" * * * * * or unless, in the case of an applicant with a positive test, such applicant presents and files a certificate from a physician duly licensed to practice in the State of Missouri stating that to his or her best knowledge and belief, after having made a thorough physical examination of such applicant, he or she is not infected with syphilis, or if so infected is not in the stage of the disease wherein it is communicable either to the spouse or the offspring, which said physician's certificate shall have attached thereto a laboratory report of the test for syphilis made by such laboratory; * * * * * "

The question you ask is an exceedingly close one and the opinions of the courts are not in harmony on the meaning of the word "physician". The earlier decisions almost universally held the word "physician" did not include persons practicing osteopathy, but in later years decisions in some states have held the word to include osteopaths. The courts of Missouri have not passed upon the word in recent years. There are two early decisions which hold that osteopaths are not physicians. These cases are Grainger v. Still, 187 Mo. 197, 224:

"It will thus be observed that the position of osteopaths in this State is not only anomalous, but that it is sui generis. Anomalous, because while it is spoken of as a system, method or science, it is yet declared not to be the practice of medicine

and surgery, in any of its departments. And sui generis, because osteopaths are not subjected to the jurisdiction of the State Board of Health, as all other practitioners of medicine and surgery, in any of its departments, are. Yet, any legally authorized practitioner of medicine and surgery is expressly permitted to cure or relieve diseases, with or without drugs, or by any manipulation by which any disease may be cured or alleviated.

"In other words, osteopaths are not physicians or surgeons, in any of the departments of medicine or surgery, but may cure or relieve any disease of the human body according to the system, method or science as taught by the American School of Osteopathy of Kirksville, Missouri, or any other legally chartered and regularly conducted school of osteopathy.

"Neither the statute nor the record in this case shows what such system, method or science is. The plaintiff offered to prove that they use the same textbooks as other schools of medicine, and also that they have no fixed rule of practice for the treatment of hip joint disease, and, for the purposes of the case, the trial court ruled that such facts might be considered as proved."

and the case of Le Grand v. Security Benefit Association, decided by the Springfield Court of Appeals and reported in 240 S. W. 852, 854:

"Section 7330, R. S. 1919, a part of article 1, c. 65, R. S. 1919, which has been the law for many years (Laws 1901, p. 207), provides that it shall be unlawful for any person not a registered physician within the meaning of the law to practice medicine or surgery in any of its departments. Section 9202, R. S. 1919, supra, which was enacted in 1897, specifically provides that the practice of osteopathy is not the practice of medicine and surgery within the meaning of article 1, c. 65. In Grainger v. Still, 187 Mo. 197, loc. cit. 224, 85 S. W. 114, 1123 (70 L. R. A. 49), this language appears:

"In other words, osteopaths are not physicians or surgeons, in any of the departments of medicine or surgery, but may cure or relieve any disease of the human body according to the system, method or science as taught by the American School of Osteopathy of Kirksville, Missouri, or any other legally chartered and regularly conducted school of osteopathy."

The Still case, supra, was a damage suit against an osteopath for malpractice; the Le Grand case was an insurance case. Most of the decisions undertaking to define or construe the word "physician" have been in insurance cases. From these two decisions here cited it is apparent that under the present Missouri decisions the word "physician" as used in line 9 on page 2 of House Bill No. 45 would not include persons practicing osteopathy unless there should be some other provision of the law which, when construed with House Bill No. 45, would broaden the meaning of the word sufficiently to include osteopaths.

In your letter you mention Section 10046, Article 1, Chapter 76, R. S. Mo., 1939:

"Osteopathic physicians shall observe and be subject to the state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, and such reports shall be accepted by the officer or department to whom such report is made."

For a number of years this State has had laws and regulations pertaining to the control and quarantine of contagious diseases and pertaining to the registration of births and deaths. Osteopaths, having been held not to be physicians and the statutes, Section 10042, declaring that persons practicing osteopathy were not engaged in the practice of medicine, it is the view of the writer that Section 10046, supra, was enacted for the purpose of bringing the osteopaths under the laws and regulations pertaining to the control of contagious

diseases and the registration of births and deaths.

If the purpose of the statute was not to bring the osteopaths under the regulations concerning contagious diseases and the record of births and deaths but was to confer upon them some right, it would be necessary to determine just how far it goes in conferring rights. In this connection it is desired to call to your attention the rule of eiusdem generis, which rule together with the exceptions is very aptly set out in Volume 59, page 981, section 581 of Corpus Juris:

"By the rule of construction known as 'eiusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes are therefore to be read as 'other such like,' and to include only others of like kind or character. The doctrine of eiusdem generis, however, is

only a rule of construction, to be applied as an aid in ascertaining the legislative intent, and cannot control where the plain purpose and intent of the legislature would thereby be hindered or defeated; nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless, nor where there are no specific terms followed by general terms.
* * * * *

In connection with this rule and its application the following Missouri cases are cited and quoted from:

State ex rel. Goodloe v. Wurdeman, 286 Mo. 153, 161, 162, which illustrates the operation of this rule:

" * * * * * It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind. (19 C. J. p. 1255.) An exception to this rule occurs where the specific clauses exhaust the class, so that the general word or phrase must be construed to have a meaning beyond

the general class, or must be discarded altogether. (State v. Smith, 233 Mo. 242, 1. c. 257.)

"It is obvious that the specific words in this instance do not exhaust the general class of those having a pecuniary interest in the estate. An administrator has such an interest for example. (See In re McCune's Admr., 76 Mo. 200, 1. c. 205.)

"We therefore conclude that the present is a proper case for the application of the rule of ejusdem generis (State v. Wade, 267 Mo. 249, 1. c. 257), and that the general clause 'other person having an interest in the estate' is properly construed as embracing only such other persons as have a pecuniary interest in the estate."

Regan v. Ensley, 283 Mo. 297, 307, 308, which also illustrates the operation of the above rule:

"There is no dearth of technical reasons based purely upon the canons of construction to sustain the conclusion we have reached herein. The language of that portion of the statute (Sec. 5435, supra) under discussion is as follows: 'The husband shall be debarred from and

incapable of selling, mortgaging or alienating the homestead in any manner whatever,' etc. A rule of construction provides that where general words follow particular words, the former will be construed as applicable only to persons or things of the same nature or class as the latter; or, as we have stated it, 'general words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms. (State ex rel. Pike County v. Gordon, 268 Mo. 321.) In the application of this rule to the statute quoted the meaning of the general word 'alienation' may properly be restricted to that embodied in the particular words 'selling' and 'mortgaging.'

"A like construction may be given to that portion of the proviso of the same section that 'nothing herein contained shall be construed to prevent the husband and wife from jointly conveying, mortgaging, alienating or in any other manner disposing of such homestead or any part thereof.' As we have shown, there could not well be a joint alienation by devise and the framers of the law evidently did not so intend. The reasonable construction of this proviso, therefore, is that such a joint alienation was authorized as is expressed by the words 'conveying or mortgaging' and that the word 'alien-

ating' should be restricted in its meaning to that given to the preceding words, while the words 'or in any manner disposing' may be construed as suppletory. Thus interpreted, the husband's power of alienation by devise is not prohibited by the statute. In the application of this rule the purpose of the homestead law is not to be lost sight of. This necessitates a modification of the foregoing rule of construction which, while not prohibiting alienation by devise, limits the exercise of same to cases where the rights of the widow and minor children are not thereby affected."

State v. Eckhardt, 232 Mo. 49, 52, 53, 54, is an exception to the above rule:

"Defendant contends that the place of exposure and abandonment 'must be a street or field, or like place, where the exposure is as great or greater than if in a field or street, and not in a place of shelter as charged in the indictment.' By this contention we understand the defendant to invoke the doctrine of ejusdem generis, a familiar rule of construction, that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or

things of the same general nature or class as those enumerated. 'The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words "other" or "any other," following an enumeration of particular classes are therefore to be read as "other such like," and to include only others of like kind or character. The doctrine of ejusdem generis, however, is only a rule of construction, to be applied as an aid to ascertaining the legislative intent, and does not control where it clearly appears from the statute as a whole that no such limitation was intended. Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another; nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless.' (36 Cyc. 1119-1122.) This definition fairly and clearly explains the meaning, purpose, manner of applying and limitations of the doctrine invoked.

"It is very clear to us that the principle of ejusdem generis cannot be applied here, nor yet the doctrine of noscitur a sociis, for the words 'street' and 'field,' appear-

ing in the statute, are not even remotely related, and neither derives any color from association with the other, but each stands as the representative of a distinct class. The meaning, then, of the general expression 'or other place,' in the statute is not restricted or affected by the preceding particular words, which 'signify subjects greatly different from one another.'

"Endlich on the Interpretation of Statutes, section 409, says: 'Further, the general principle in question applies only where the specific words are all of the same nature. Where they are of different genera, the meaning of the general word remains unaffected by its connection with them. Thus, where an act made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, dress, or disguise, or any letter, or any other article or thing," it was held that the last general terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever which could in any manner facilitate the escape of a prisoner, such as a crowbar. (Reg. v. Payne, L. R. 1 C. C. 27.)'

"The great fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. For

the purpose of discovering the legislative intent it is proper, and often necessary, to consider the history of the statute, the reason for its enactment, and the prior state of the law on the subject to which the statute relates. (Gabriel v. Mullen, 111 Mo. 119; Greeley v. Railroad, 123 Mo. 157; Missouri Light Co. v. Scheurich, 174 Mo. 235; State v. Balch, 178 Mo. 392.)"

State v. Smith, 233 Mo. 242, 256, 257, which is also an exception to the rule of eiusdem generis:

"Defendant claims that the general words in the statute, 'attempting to treat the sick,' should, by the application of the rule of eiusdem generis, be limited to attempts to treat by medicine or surgery, which are the special words preceding.

"As early as 1877 the Legislature of this State enacted a law 'to regulate the practice of medicine and surgery,' and made it a misdemeanor for any person 'to practice or attempt to practice medicine or surgery' without complying with the provisions of the act. This provision was carried through the various revisions up to and including section 8517, Revised Statutes 1899, excepting only that the words 'attempting to practice' were drop-

ped, so that the revision of 1899 reads: 'Any person practicing medicine or surgery in this State without complying with the provisions of this article,' etc. The revisions of 1889 and 1899 also provided that 'every person practicing medicine and surgery in any of their departments' should possess the qualifications therein specified. In 1901 article 1 of chapter 128 of the 1899 revision, relating to medicine and surgery, was repealed, and a new act passed covering the subject. Section 3 of the act provided that 'all persons desiring to practice medicine or surgery in this State, or to treat the sick or afflicted as provided in section 1,' should apply to the State Board of Health for examination.

"This review of the history of the law affords a complete answer to the claim that the doctrine of eiusdem generis applies to this case. It is not a case of general words following a specific designation. There might be some ground for the claim if the general words 'treating the sick' were in the original act. As shown above, until 1901 the only designation was 'medicine and surgery.' No one will claim that the general words, 'and any person attempting to treat the sick,' added by amendment, are eiusdem generis with the specific words of the original act.

"Furthermore this rule of ejusdem generis is, after all, resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the Legislature intended the general words to go beyond the class specially designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class, or be discarded altogether. (National Bank v. Ripley, 161 Mo. 1. c. 132; Lewis's Sutherland on Stat. Const., sec. 437.) Certainly the words 'medicine or surgery in any of its departments' exhaust the genus or class.

"It is obvious that the Legislature, by this amendment, intended to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery. Evidently the Legislature, in order to guard the over-credulous against injury that might result from yielding to the solicitations and professions of men who ignorantly undertake to diagnose and treat human ailments, deemed it proper, in the exercise of its police power, to require all persons, who undertake to so treat the sick, to show that they possess the qualifications which the

lawmakers prescribe as essential."

Undertaking to apply this rule to Section 10046, supra, it is immediately apparent that the clauses relating to contagious diseases and the registration of births and deaths would not tend in any way to broaden the meaning of the word "physician" as used in House Bill No. 45. The reason for this is that the disease for which the certificate would be required is not a contagious disease but an infectious one, and the registration of births and deaths has no connection whatever with the freedom of some persons from syphilis.

This leaves only the last clause of the section relating to all matters pertaining to public health which might be construed to have the effect, when read with House Bill 45, of broadening the meaning of the word "physician" to include osteopaths under the exceptions to the rule of ejusdem generis. You will see the question is very close.

As previously pointed out, it is the view of the writer that Section 10046, supra, was enacted for the purpose of bringing osteopaths under certain regulations and not to confer rights upon them. The purpose of House Bill 45 is to protect the public health and prevent marriages of persons suffering from syphilis. The clause of this house bill quoted above and which has in it the word "physician" authorizes the issuance of a marriage license when the applicant presents a certificate showing he or she is not infected with syphilis, or if infected, the disease is not in a communicable stage and specifically designates what class of persons are authorized to execute this certificate. It confers a right or power upon this class of persons, namely, physicians.

Mr. W. W. Sunderwirth

-17-

March 25, 1943

CONCLUSION

Under the existing decisions of the Missouri courts and the text and purpose of House Bill No 45, it is the opinion of the writer that the word "physician" as used in line 9, page 2 of House Bill No. 45, is not broad enough to include persons practicing osteopathy.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

OFFICERS: Justice of the Peace: Justices of the peace
may hold the office of
deputy recorder of deeds
at the same time.

January 16, 1943

Honorable H. Tiffin Teters
Prosecuting Attorney
Jasper County
Carthage, Missouri



Dear Sir:

This is in reply to your request for an opinion
under date of January 13, 1943, in regard to the ques-
tion which you state has been raised,

" * * * as to whether or not a
Justice of Peace may also be a
Deputy Recorder for the limited
purpose of issuing marriage li-
censes, particularly when they
will serve without a salary."

In a careful research we fail to find any statute
or any section under the Constitution which prohibits
a person from holding two county offices. The Constitu-
tion does prohibit a state officer holding an office
under the United States as it appears in Section 4,
Article XIV of the Constitution of Missouri. The
Constitution of Missouri also prohibits, in counties
or cities having more than two hundred thousand (200,000)
inhabitants, the holding, by anyone, of a state office
and an office in any county, city or other municipality.
This is set out in Section 18, Article IX of the Consti-
tution of Missouri.

Section 18, Article IX of the Constitution of Missouri reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

Although the above section only applies in cities or counties having more than 200,000 inhabitants and prohibits the holding of a state office, or the office of any county, city, or other municipality at the same time, and prohibits the filling of two municipal offices, yet, it specifically sets out that the section shall not apply to justices of the peace.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding two county offices, we must refer to the common law. In the case of *State ex rel. Walker, Attorney General v. Bus*, 135 Mo. 325, which was passed upon by the Supreme Court of this state, June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of school director in the City of St. Louis.

The case of *State ex rel. Walker, Attorney General, v. Bus*, supra, was followed in the case of *State ex rel. Langford v. Kansas City*, 261 S. W. 115, and in that case the court held that the office of a deputy

sheriff was not incompatible with the office of city clerk. In paragraph 1, the court said:

"The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of the trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S. W. 1159."

In that case, the court, at page 116, said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was

most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo. (36 S. W. 639):

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two — some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Also, in the case of State ex rel. v. Lusk, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case originating in the Circuit Court of Cole County, Missouri.

46 C. J. sets out the rule in Section 46, page 941, as to the construction as to whether or not two offices under the common law are incompatible.

Section 46, of 46 C. J., supra, reads as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

We must therefore look to the powers and duties of justices of the peace and deputy recorders of deeds, respectively.

We fail to find, in Chapter 89, (R. S. Missouri, 1939), which applies to the recorder of deeds, any duties that are incompatible, conflicting, repugnant and inconsistent with the duties of a justice of the peace, and those of a deputy recorder of deeds. The duties of a justice of the peace are set out in Chapter 11 of the Revised Statutes of Missouri, 1939.

The only officer set out by statute as being ineligible to be a justice of the peace, and another officer at the same time, is a clerk of the circuit court, or clerk of the county court. (Section 2526 R. S. Missouri, 1939).

A justice of the peace is a township officer, for the reason that his jurisdiction and election are confined to a township. A justice of the peace is commonly called, a "county officer." We do not find any constitutional, or statutory, prohibition which would prevent a justice of the peace from holding another county office at the same time, except that of clerk of the circuit court or clerk of the county court, as set out in Section 2526, supra.

The main question involved, where there is no statutory or constitutional prohibition, is, whether or not the duties of a justice of the peace and the duties of a deputy recorder of deeds are inconsistent, conflicting, repugnant or inconsistent. In the State of Pennsylvania, it was held that a justice of the peace and an associate judge of the court of common pleas were not incompatible officers, although the incumbent, as judge, might be called upon to give judgment in the common pleas on a judgment rendered by him as a justice of the peace. (Commonwealth v. Sheriff of Northumberland County, (Pa.) 4 Serg. & R. 275.)

The above citation is set out for the reason that I am assuming that it is probable that the deputy recorder of deeds, so appointed, may have the blanks for marriage licenses, including the application, and may perform a

Honorable H. Tiffin Teters

-7-

January 16, 1943

marriage ceremony as a justice of the peace. A justice of the peace may solemnize a marriage, as authorized under Section 3363 R. S. Missouri, 1939. Such a procedure, that is, the granting of the marriage license, and the performing of the ceremony, would not be considered incompatible, conflicting, repugnant or inconsistent with the duties of a justice of the peace.

CONCLUSION

It is, therefore, the opinion of this department, that a person may hold the office of justice of the peace, and the office of deputy recorder of deeds at the same time, for the reason that the duties of either office are not incompatible, conflicting, repugnant, or inconsistent with the duties of the other.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED:

ROY McKITTRICK

Attorney General of Missouri

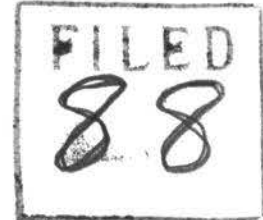
WJB:RW

ELECTIONS:

CONSTITUTIONAL CONVENTION: Mode of conducting election of delegates to Constitutional Convention.

January 16, 1943

Mr. H. Tiffin Teters
Prosecuting Attorney
Jasper County
Carthage, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the mode of electing delegates to the Constitutional Convention.

Under Section 3 of Article XV of the Constitution of Missouri the provision in relation to election of delegates to a Constitutional Convention reads as follows:

"* * * The electors of each senatorial district of the state, as then organized, shall elect two delegates as herein provided at such election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large, such election to be conducted as provided by law; * * * * *

The lawmakers by Section 11683, R. S. Mo. 1939, have made provision for elections for the purpose of electing delegates to a Constitutional Convention. This section reads as follows:

"Whenever an election shall be called to elect delegates to a constitutional convention or an election called for the purpose of ratifying a submitted new Constitution, said election shall be conducted in the manner provided by law

for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions were submitted at a general election; except, that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and the next highest number of votes for governor at the last general election: Provided, however, that in all cities and counties of this state where registration of voters is now or may be provided for by law, elections under the provisions of this section shall be held in accordance with the provisions of law now in effect, applicable to the holding of elections in said cities and counties, and the county committee of each political party which at the general election for governor held next preceding any special election to elect delegates to a constitutional convention or for ratification of a new Constitution, cast at least ten per cent of all the votes cast at such election for governor in such city and county, shall appoint three judges and one clerk outside of such city for election under the provisions of this section, and in all such cities the judges and clerks of elections regularly appointed or that may be hereafter appointed and commissioned for regular state and county elections shall act as judges and clerks of all special elections under the provisions of this section. All acts or parts of acts inconsistent with the provisions of this act are hereby declared inapplicable to elections called for the purpose herein provided for."

By this section you will note that in counties and cities other than those in which registration of voters is provided

for only two judges and two clerks at each polling place is required.

It will also be noted by this section that in cities and counties which have registration of voters then the election of delegates to the Constitutional Convention is conducted in the same manner that is followed under the general election laws. Since there may be some different provisions for elections in cities and counties which have registration of voters, then the procedure for such cities and counties would depend entirely upon the election law as it applies to such cities or counties.

CONCLUSION

From the foregoing it is the opinion of this department that in counties and cities other than those which have registration of voters, only two judges and two clerks at each polling place may be selected to act at an election to elect delegates to the Constitutional Convention.

We are further of the opinion that in cities and counties which have registration of voters the general law applicable to such cities and counties should be followed in selecting judges and clerks for an election to elect delegates to the Constitutional Convention.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney - General

SALARIES AND FEES: In counties of less than 100,000 the
COUNTY ASSESSOR: assessor is entitled to fees of
\$5,000.00, exclusive of deputy hire.

February 5, 1943

Honorable H. Tiffin Teters
Prosecuting Attorney
Jasper County
Carthage, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
under date of February 2, 1943, which reads as follows:

"We desire a ruling from your office
in regard to the amount of compensa-
tion paid to the Assessor in Jasper
County, Missouri. I have before me
your opinion of October 20, 1942,
addressed to Hon. Forrest Smith,
State Auditor, to the attention of
W. A. Holloway, Chief Clerk, in re-
gard to this matter. Jasper County
now has a population of over 78,000
and we desire to know 'what is the
maximum amount of fees or salary
which shall be paid to the assessor
of Jasper County, Missouri.'

"The Assessor has presented a state-
ment to the County Court setting
forth that he has taken 38,087 assess-
ment lists at 25¢ each, or \$9521.75,
he has entered 23,988 personal lists
at 3¢ each, or \$719.64, he has entered
27,496 tracts of real estate at 3¢ each,
or \$824.88, he has taken and entered
2194 crop reports for the State Board

February 5, 1943

of Agriculture at 4¢ each, or \$87.76, making a grand total of \$11,154.03. \$5577.01 is being asked to be paid by the County and Mr. Trusty, our Assessor has presented a bill to the State for \$5577.02.

"In the State Auditor's digest of laws pertaining to the County Assessor prepared and compiled by Forrest Smith on pages 142 and 143 under compensation of the Assessors, the maximum is stated to be controlled by Sec. 13450, R. S. Mo. 1939. This is also set out on Page 5 of your opinion dated October 20, 1942, aforesaid.

"Sec. 10,946, R. S. Mo. 1939 provides that 'the Assessor may appoint as many deputies as he may see necessary to be paid for out of fees allowed to such Assessor for whose official acts he shall be responsible - - - - -'.

"The Assessor states that the cost of his Clerk and Deputy hire will run well in excess of \$5000 and contends that he is entitled to the full amount of fees and that Sec. 13450 R. S. Mo. 1939 does not apply in this case, as said section contemplates an office where fees are collected and retained. The Assessor collects no money and retains no fees whatsoever but such fees are paid direct to the Assessor by the County and State.

Honorable H. Tiffin Teters (3) February 5, 1943

"If in your opinion \$5000.00 is the maximum salary or fees that may be retained by the Assessor are the costs of clerk and deputy hire first deducted and the balance if any, paid to the assessor in excess of \$5000.00?"

In the above request you refer to an opinion rendered by this office to the Honorable Forrest Smith, State Auditor, another copy of which we are enclosing, but in that request the questions were:

"2. In arriving at the net salary of the Assessor, is he permitted to deduct his automobile expense?

"3. Is the assessor authorized to make a charge for 'compiling land blotters' and for correcting land blotters?"

In answer to your request, we are setting out Section 13450 R. S. Missouri, 1939, which reads as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants or more. After the

Honorable H. Tiffin Teters (4) February 5, 1943

first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

The above section is unambiguous and the language is very plain, in which it states:

" * * * exclusive of the salaries actually paid to his necessary deputies, * * * *."

You also state in your request that the fees of the assessor will amount to \$5,577.02, which includes the pay of his deputies.

The purpose of the above section 13450, supra, is in line with Section 13, Article IX of the Constitution of Missouri, which prohibits the payment of a salary in excess of \$10,000.00 to any public officer, and under Section 13450, supra, if the assessor has employed deputy assessors his salary will not be more than \$5,000.00, as set out in the limitations by the legislature.

Section 10946 R. S. Missouri, 1939, provides for the appointment of deputy assessors, and in a careful search of the statute we fail to find any limitation upon the appointment of deputy assessors.

Honorable H. Tiffin Teters (5) February 5, 1943

In your request you state, " * * * that Sec. 13450 R. S. Mo. 1939 does not apply in this case, as said section contemplates an office where fees are collected and retained. The Assessor collects no money and retains no fees whatsoever but such fees are paid direct to the Assessor by the County and State." In reading Section 13450, supra, we do not find that it mentions anything about collecting or retaining fees, but specifically states:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. * *"

The language in the above section is unambiguous and does not refer to the retaining of any fees.

CONCLUSION

It is, therefore, the opinion of this department, that the county assessor of Jasper County may retain or be paid fees earned by him as assessor, under the facts set out in your request, in the amount of Five Thousand (\$5,000.00) Dollars, exclusive of the salaries actually paid to his necessary deputies.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

ROADS AND BRIDGES: Town board cannot vote by mail in eight-mile road district, when the city limits of the city is not situated more than ten miles from county seat.

February 26, 1943

Honorable H. Tiffin Teters
Prosecuting Attorney
Jasper County
Carthage, Missouri

3-1



Dear Sir:

We are in receipt of your request for an opinion, under date of February 20, 1943.

This request involves solely the construction of Section 8675 R. S. Missouri, 1939, and reads as follows:

"I have been requested by the County Court to ask your opinion concerning a part of Sec. 8675, R. S. Mo. 1939. The statute states that 'provided, that where the city is located a greater distance than ten miles from the meeting place of the County Court', the City officials may transmit their decisions by mail. This problem has presented itself:

"The distance from the County Court house to the city limits of a city is 9.5 miles, while the mileage from the Courthouse to the City Hall on Broadway is 10.1 miles. Which is the determining factor?

"Should the mileage be to the city limits, or to the business district, or to the City Hall?"

You state that the distance from the county courthouse to the city limits of the city is 9.5 miles.

Section 8675 R. S. Missouri, 1939, reads as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may

make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk." (Under-scoring ours.)

Under the above section the legislature saw fit to say, "Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court," and did not say, where the business district or city hall is located. This shows that it was the intention of the legislature that the distance between the meeting place of the county court and the city itself must be more than ten miles before the mayor and members of the city council could designate their choice by transmitting it to the county clerk by mail.

The above section is unambiguous and needs no construction. Since it sets out the procedure that should be followed, only that procedure should be followed. (State ex rel Kansas City Power & Light Company v. Smith, State Auditor, 111 S. W. (2d) 513.) In that case it was specifically held that the expression of one thing in the statute is the exclusion of another. Section 8675, supra, specifically states that the city must be a greater distance than ten miles from the meeting place of the county court. There is no mention of the business district or the city hall in that section. The courts, in construing that section, could not interpolate the words, "business district" or "city hall." Such a ruling was had in the case of St. Louis Rose Company v. Unemployment Compensation Commission, et al, 159 S. W. (2d) 249, pars. 2-4, where the court said:

"In order to sustain the commission's contention it would be necessary for us to substitute the term 'farm labor', a narrower classification, for 'agricultural labor' or to write into the law that only such agricultural labor as is performed on a farm is exempt. This we may not do. In view of the commonly understood meaning of the term the legislature would have included such a restriction had it intended one. Nor can we impose such a restriction through the doctrine of strict construction of a tax exemption provision. There is no ambiguity here. Where there is no ambiguity there is no need for either a liberal or strict construction. * *"

Under the above section, it is mandatory that the members of the town board meet with the county court within two weeks after the voters in such a district shall adopt the provisions of Article 10, Chapter 46 of the Revised Statutes of Missouri, 1939. At the meeting in the county court room the presiding judge shall preside, and the county clerk shall keep a record. At this meeting the commissioners for the road district shall be appointed, one for three years, one for two years, and one for one year. The same procedure as for original appointment is followed when vacancies occur.

When the meeting of the county court for the city, town or village officers is called, the city, town or village officers each are entitled to vote,

It was so held in the case of State ex inf. Holt, Pros. Attorney, ex rel. Jones v. Meyer, 12 S. W. (2d) 489, 1. c. 490, where the court said:

"Respondent, Meyer, contends that under section 10802, R. S. 1919, the mayor and councilmen are each entitled to cast a vote for commissioner.

"Relator, Jones, contends the mayor and councilmen sit as one member of the county court and together have only one vote, and that, two members of the county court having voted for him, he thereby received a majority of the legal votes cast.

"These contentions call for a construction of section 10802, * * * * *

"It will be noted, that, on the assembling of the mayor, the members of the council, and members of the county court, the meeting is declared organized, with the presiding judge as the presiding officer and the county clerk as clerk of the meeting. They do not meet as officers of the city or as officers of the county. They meet as one body, for the sole purpose of appointing the commissioners. Neither the city council nor the county court has any control over the public highways within the district outside of the corporate limits of the city. Such control is lodged exclusively with the board of commissioners. Section 10809, R. S. 1919.

* * * * *

"The statute no more limits the mayor and members of the council to one vote than it limits the members of the county court to one vote. No doubt the law-makers assumed the members of the meeting would be so interested in the welfare of the district that they would not permit rivalry between the county court and the city council to interfere with the honest performance of their duty. Each member of the meeting is authorized to participate in the appointment, and, absent a word in the statute to the contrary, we must hold each member of the meeting to have a vote. The statute so

remained for twenty years and until 1915, when the following proviso was added: 'Provided that where the city is located a greater distance than ten miles from the meeting place of the county court; the mayor and city council of the city or town within the road district for which commissioners are to be appointed; the mayor and members of the city council may make a written certificate of their choice of a commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger; and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided that such certificate shall be given over the signature of the mayor or acting mayor, attested by the seal of the city and signature of the city clerk.' Laws of 1915, p. 375.

"It is clear the lawmakers by this proviso only intended to relieve the mayor and councilmen from attending the meeting if the city was located more than ten miles from the meeting place. By the proviso, the city is not authorized to make a written certificate of its choice, but the mayor and members of the council are authorized to do so. The choice designated in the certificate must be given the same consideration as though the mayor and members of the council were present. We have ruled the statute as originally enacted authorized each member of the meeting to cast a vote; and, if the choice designated in the certificate is to be given the same consideration as though a member was present and voting, then his choice designated in the certificate must be counted as a vote for commissioner. The

requirement that the first, second, and third choice be designated has reference to the first meeting after the organization of the district, when three commissioners are to be appointed. Thereafter, at a meeting for the appointment of only one commissioner, the first ballot might not result in an appointment; if so, on the second ballot the absent member's second choice could be voted, and so as to his third choice." (Under-scoring ours.)

Section 10802 R. S. Missouri, 1919, is now Section 8675 R. S. Missouri, 1939.

The court in the above case described how the meeting should be held, and that the members of the city were each entitled to a vote, and were not confined to the city casting only one vote. The court also, in the above case, in passing on the provision that the town board may send in the vote, properly certified by written certificate, of their choice for road commissioner, or road commissioners, specifically stated, "it is clear the lawmakers of this proviso only intended to relieve the mayor and councilmen from attending the meeting if the city was located more than ten miles from the meeting place."

The Supreme Court of this State has not passed directly on the method of determining the distance as is set out in Section 8675, supra. However, the Federal Court, in determining such a distance, in the case of *Evans v. United States*, 261 F. 902, 1. c. 904, said:

"Distance is to be measured in a straight line in a horizontal plane, unless there is a clear indication that another mode of measurement is to be adopted. 9 Am. & Eng. Encyc. of Law, p. 614. Distance is a straight line along the horizontal plane from point to point. It is measured from the nearest point of the one place to the nearest point of the other. 18 C. J. 1287."

Honorable H. Tiffin Teters (8) February 26, 1943

Under the holding in the above case, and under the unambiguous words in Section 8675, supra, it can only be construed that it refers to the distance from the place specifically named (the meeting place of the county court) to the nearest point in the city, which would be the city limits.

CONCLUSION

It is, therefore, the opinion of this department that since the city limits of the city mentioned in your request is only 9.5 miles from the meeting place of the county court, the mayor and councilmen of the city must attend the meeting, in person, for the appointment of a person for re-election as commissioner of the special road district. They cannot make a written certificate of their choice of the commissioner, or commissioners, to be appointed by transmitting it to the county clerk by mail, or by special messenger.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY May not make daily reports and deposits with
COLLECTOR: county treasurer unless authorized by statute.

March 5, 1943



Honorable H. Tiffin Teters
Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Mr. Teters:

Under date of February 20, 1943, you wrote this office requesting an opinion as follows:

"I have been requested by the County Collector of this County to obtain from your office an opinion as to whether or not the County Collector may make daily reports and payments to the County Treasurer's office, filing with said reports a detailed statement verified by affidavit, the same as on the monthly reports.

"By Sec. 11098, R. S. Mo. 1939, the Collector is to make a report before the fifth day of each month and payment before the fifteenth. Sec. 11103 provides for payment also.

"The Collector contemplates in addition to making a report and daily remittances to the Treasurer's Office, to also make the monthly report statement, which would be compiled from the daily reports.

"Please advise if you know any reason why such daily reports should not be made."

In your letter you refer to Section 11098 and Section 11103 R. S. Mo., 1939. These sections of the statutes are herein set out and are respectively as follows:

"Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

"Every collector of the revenue having made settlement, according to law, of county revenue by him collected or received, shall pay the amount found due into the county treasury, and the treasurer shall give him duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant him full quietus under the seal of the court."

No authority has been found which would justify the county collector in making daily reports and payments to the county treasurer's office as contemplated by him.

The foregoing sections of the statute do not provide for payment and report daily. The maxim, "expressio unius est exclusio alterius", is applicable to statutes prescribing a method of doing something. *Keane v. Strodtman*, 18 S. W. (2d) 896, 1. c. 898:

" * * * * * The familiar maxim of "expressio unius est exclusio alterius" may also be invoked, for the maxim is never more applicable than in the construction of statutes. *Whitehead v. Cape Henry Syndicate*, 105 Va. 463, 54 S. E. 306; *Hackett v. Amsden*, 56 Vt. 201, 206; *Matter of Attorney General*, 2 N. M. 49.

"Certainly where, as at bar, the statute (section 2702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 626, 85 S. W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'"

Further, in this connection it is desired to

call to your attention that the General Assembly in some instances has made different provisions concerning reports and deposits by collectors. Section 11056 R. S. Mo., 1939, authorizes county courts in counties having a population of less than seventy-five thousand to require the collector to make daily deposits in the county depository. Section 13871 R. S. Mo., 1939, requires the collector in counties in which there is a city having a population of not less than fifty thousand nor more than one hundred fifty thousand inhabitants to report daily to the county auditor.

Section 13893 R. S. Mo., 1939, requires the collector in counties having a population of more than eighty thousand and less than one hundred fifty thousand inhabitants to make daily reports to the county auditor. Section 13909 R. S. Mo., 1939, requires the collector in counties having a population of not less than fifty thousand nor more than one hundred fifty thousand and having a total taxable wealth of more than fifty million dollars to make daily reports to the county auditor and to deposit daily in the county depository.

By these sections of the statutes we have a legislative interpretation of Section 11099 and 11103, supra. The General Assembly, in making these other sections of the statutes, clearly shows that it was the intention of the Legislature that Section 11099 and 11103, supra, are mandatory, and that the collector would not be authorized under those sections to make reports and deposits in any other manner.

Legislative interpretations are not binding upon courts, but they are entitled to great weight. Morgan

March 5, 1943

v. Jewell Construction Company, 91 S. W. (2d) 683, 1.c. 641:

"It is well established that a construction of a statute by the Legislature, as indicated by the language of other or subsequent enactments, is entitled to consideration as an aid to interpreting a statute. 29 C. J. p.1033; State ex rel. v. Kachmann, 275 Mo. 47, 54, 204 S. W. 513; State ex inf. v. Long-Bell Lumber Co., 321 Mo. 481, 12 S. W. (2d) 64; Evans v. McLalin, 189 Mo. App. 310, 175 S. W. 294; State ex rel. v. Wilson, supra; Cronin v. Kansas City Home Telephone Co., 131 Mo. App. 313, 109 S. W. 1038. * * * * *

CONCLUSION

From the foregoing it is the opinion of the writer that the collector of Jasper County should not make daily reports and deposits with the treasurer as contemplated by him. If the present method provided by statute for making reports and deposits by the collector is not satisfactory, it is suggested that the General Assembly is in session at the present time and the matter of amending a statute might be presented to the Assembly.

Respectfully submitted,

APPROVED:

W. C. JACKSON
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

WOJ:FS

COUNTY CLERK : May not establish branch offices unless
RECORDER OF DEEDS : authorized by statute.

June 17, 1943



Hon. H. Tiffin Teters
Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Mr. Teters:

Under date of June 9, 1943, you wrote this office requesting an opinion as follows:

"The county recorder and the county clerk both maintain a branch office and conduct the regular business in the city of Joplin in Jasper County in the Court House building leased there and in view of the recent controversy regarding the establishment of a branch collector's office in Joplin, the Chamber of Commerce of Carthage and their attorney, the county clerk, the county recorder and the county court have requested that I obtain from your office an opinion as to whether or not it is legal for the two county offices to maintain branch offices in the city of Joplin, Jasper County, Missouri, located seventeen miles from the county seat of Carthage, the same being a city of over 40,000.

"Section 13148 R. S., Missouri, 1939, provides for the maintenance of a recorder's office at the seat of justice.

"At the present time the recorder and county clerk both appointed the same woman as a deputy. The branch office in Joplin is maintained in the leased court house building

there and the deputy is paid a salary for being deputy county recorder and deputy county clerk. Marriage licenses are issued by the deputy, chattel mortgages are filed in this branch office on the odd minutes in order not to conflict with chattel mortgages filed in Carthage on the even minutes and are brought back to Carthage each day and posted in the books in the main office. Real Estate mortgages are accepted there with the understanding that they will be filed for record at the main office at Carthage prior to the opening of business on the following day. All the books and practically all the work is done in the office in Carthage with the exception of the deputy in Joplin receiving the chattel and real estate mortgage and issuing marriage licenses.

"The county clerk has charge of the registration books for the city of Joplin and it is necessary that he maintain some type of office in Joplin for the registration of voters in the city of Joplin and the same woman who is deputy recorder is also deputy county clerk and takes care of the registration books for the city of Joplin. This is all the deputy county clerk in Joplin does, taking care of and looking after registration books for the city of Joplin.

"The county court appointed the same woman to fill both offices as an economy measure and this woman could easily take care of all work in that office.

"Will you please advise if under the above statement of facts, whether the recorder of deeds of Jasper County, Missouri and the county clerk of Jasper County, Missouri have a right to maintain a branch office in the city of Joplin, Jasper County, Missouri."

June 17, 1943

In your letter you mentioned Section 13148 R. S. Missouri 1939, which directs where the Recorder of Deeds in each county shall keep his office. This section is as follows:

"The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books, in which the recorder shall record all instruments of writing authorized and required to be recorded. If there is not courthouse or other suitable county building at the seat of justice, the county court shall provide an office for the recorder at any other place in the county where there is a courthouse and courts of record are held."

Also Section 13703, Article 4, Chapter 100, relating to county seats provides as follows:

"As soon as the court house and jail shall be erected and the circumstances of the county will permit, the county court may erect all necessary fireproof buildings for the preservation of the records of the county, at or near the court house, and may provide the means therefor by an increase of taxation as provided by section 11 of article X of the Constitution, when authorized so to do by vote of two-thirds of the qualified voters of the county voting at an election held to determine the question, which election shall be under the same conditions and regulated by the provisions of the present statutes relating to the erection of court houses and jails."

These sections of the statutes definitely fix that the Recorder of Deeds shall keep his office at the seat of government

of the county unless there is no suitable building at the county seat. The section is general in its application and unless there is some special legislation that would authorize the establishment of a branch office in some place other than the county seat, the Recorder of Deeds has no authority for having a branch office or transacting the business of the office at any other place.

The General Assembly in a few instances has authorized the maintaining of a branch office of the Recorder of Deeds at some place other than the county seat. For example, Section 15662 authorizes the Recorder of Deeds of Jackson County to maintain an office in Kansas City, Missouri.

A careful search has been made of the statutes and no law has been found authorizing the Recorder of Deeds of Jasper County to maintain an office in Joplin.

In regard to the County Clerk maintaining an office in Joplin, your attention is directed to Section 13711 which requires courts to be held at the county seat and reads as follows:

"As soon as convenient buildings for the holding of courts can be had at such new seat of justice, the county court shall notify the judges of the several courts holden in the county, and all such courts shall thereafter be held at the place so selected."

Section 13293, Article 1, Chapter 92, R. S. Missouri, 1939, provides as follows:

"Each clerk shall keep his office at such places as the court shall direct, not to be more than two hundred yards from the courthouse or permanent place of holding the court of which he is clerk, and shall there keep the records, papers, seal and property belonging to his office and transact his official business."

The County Court is required to meet in the county seat and the Clerk is required to maintain his office not more than two hundred yards from the place of holding court. From this it is apparent the Clerk has no authority under these general statutes for maintaining an office at any other place than the county seat, unless some special legislation, applying only to counties the size of Jasper County, exists. Authority is given to the county

June 17, 1943

courts, in certain counties, to establish a branch office of the County Clerk in places other than the county seat by Section 2486, which is as follows:

"In all counties in this state now containing or that may hereafter contain seventy-five thousand inhabitants or more, and where county courts are now or may hereafter be held at more places than one, and at places other than the county seat, said courts shall establish a branch county clerk's office at such place, where all the records and proceedings at such place shall be safely kept and preserved, and all acts done and performed at such place shall have the same force and effect as if done at the county seat."

This section was enacted in 1887, Laws of 1887 page 157, and prior to that time legislation had been enacted which authorized the holding of county court, in counties of the size mentioned in such section, at places other than the county seat. This section seems to have been intended to apply in Jackson County where authority for holding county court at Kansas City had previously been given.

No law has been found which authorizes the county court of Jasper County to meet at Joplin and your letter of June 14, 1943, conveys the information that the county court of Jasper County does not meet at Joplin.

The county court not being authorized to meet at Joplin and the County Clerk being required to maintain his office where the county court holds its sessions, no authority exists for the maintaining of a branch office in Joplin by the County Clerk.

In your request you state that it is necessary that the County Clerk maintain an office in Joplin because of his duties in connection with the registration of voters. Unquestionably, it is a matter of great convenience to the inhabitants of the City of Joplin to have a branch office of the County Clerk located in that city. Section 11969, Article 20, Chapter 76, deals with the duties of County Clerks in connection with the registration of voters in cities of 30,000 to 80,000 inhabitants and is as follows:

"The clerk of the county court of counties wherein a city or cities of 30,000 to 80,000 inhabitants are located shall have custody of

and keep in his office all registration books and affidavits. The county clerk, upon execution of an affidavit in the form provided by him by any person who appears at his office showing him to be a qualified voter of the city shall register such person's name in the registration books of the proper voting precinct or on execution of affidavit provided by him showing that a voter has moved from one voting precinct to another, shall transfer the name of any voter who appears at his office from the registration book to the registration book of the proper voting precinct: Provided, where a county clerk maintains more than one office, which office is located in a city within said county not the county seat of said county said registration may be made by affidavit in form and manner provided by said clerk. The name of any qualified voter may be so registered or transferred by the county clerk on any day of the year except Sundays and holidays: Provided, however, registrations and transfers must be made prior to the 25th day before an election. The county clerk shall act as clerk of the board of election commissioners and shall send out such notices and do such other acts in conformity with this article as he may be instructed to do by said board. The county clerk shall report to the board of election commissioners the names of all persons who have died in the city reported to him by registrar of vital statistics and the names of all persons reported to him by the circuit clerk of persons residing in the city who have become disqualified as voters by reason of conviction of crime and the board of election commissioners shall strike such names from the registration books. The county clerk shall keep the reports of the registrar of vital statistics and of the circuit clerk on file as public records." (Under scoring ours)

The underscored portion seems to have been enacted for the benefit of counties where the same situation exists as in Jasper County, but nothing in this section makes it necessary for the Clerk to maintain an office in the city where registration of voters is required, nor does it furnish authority to the County Clerk for

June 17, 1943

establishing such a branch office.

In your letter of June 14, 1943, you mention that the Circuit Court meets at Joplin. This is by reason of Sections 2165 and 2190 R. S. Missouri, 1939, but no mention is made of the county court.

CONCLUSION

The Recorder of Deeds and the County Clerk of Jasper County do not have authority to establish and maintain branch offices in the City of Joplin in Jasper County, unless such authority is given by statute and no statutory authority has been found authorizing the maintaining of such branch offices.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

SHERIFF'S FEES: For summoning standing jury; for summoning special jury.

November 8, 1943



Honorable George H. Tatum
Sheriff of Jasper County
Carthage, Missouri

Dear Sheriff Tatum:

Under date of October 21, 1943 you wrote this office requesting an opinion as follows:

"In regard to Section 13411 (R.S. 1929 * 11788), will you please inform me how many men a standing jury consists of, and what fee the Sheriff receives for summoning each juror over that amount."

There is herewith enclosed copy of an opinion previously written in this office by Carl C. Abington, Assistant Attorney General, to Honorable John A. Eversole, Prosecuting Attorney of Washington County, Missouri, which it is believed answers a portion of your question concerning a standing jury.

The copy of opinion enclosed treats the petit panel as the standing jury referred to in Section 13411, R.S. Mo. 1939, which was Section 11789, R.S. Mo. 1929 and not Section 11788 as was designated in your letter.

In support of what was said by Mr. Abington, the writer has examined nine law dictionaries and failed to find any definition of "standing jury". The types of juries commonly mentioned are Grand, Petit, Common, Special, Sheriff's and Coroner's. There are a few other types of extraordinary juries but they do not pertain to your question. The petit jury panel is the only one that could be intended by the words "standing jury", for it is summoned to serve for an entire term of court, unless sooner excused by the judge. The petit panel is ordinarily composed of twenty-four (Section 706, R.S. Mo. 1939), but by statute it could be made to consist of a greater or lesser number. In this connection your attention is invited to Section 738, R.S. Mo. 1939, which is a section of the statutes applicable in counties having a population of not less than sixty thousand nor more than two hundred thousand inhabitants.

November 8, 1943

Jasper County, by the 1940 census, had a population of 78,705 and could therefore come under the provisions of this section, and a petit panel, or standing jury, would consist of the total number of jurors ordered by the judges of the various divisions of the circuit court to serve for a term of court.

In regard to your second question concerning the fee which may be charged for summoning of jurors in excess of the standing or petit jury, it is believed that this is governed by the following provisions in Section 13411:

" * * * * * For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip \$0.10

For executing and returning a special venire facias 2.00
* * * * *"

Under these fee provisions the Sheriff would be entitled to charge and receive \$2.00 for the special venire facias, whether it called for one man or a dozen men, plus his mileage traveled if he served the writ more than five miles from the place of holding court.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

WOJ:ml
Enc.

CIRCUIT CLERK:
Compensation:

Not authorized to charge and retain fee
for acting as custodian of funds paid into
court.

December 16, 1943



Honorable W. R. Tilson
Clerk, Circuit Court
Maryville, Missouri

Dear Mr. Tilson:

Under date of November 27, 1943, you wrote this of-
fice requesting an opinion, as follows:

"Are the Circuit Clerks allowed to re-
tain any commission on funds impounded
in their hands by order of court, await-
ing final disposition and order for the
distribution of said fund to the parties
entitled to same."

The question you ask is one which is difficult to
answer and a more complete statement of facts would have
been of great value in preparing a reply.

The compensation of the clerk of the circuit court
is fixed by Section 13408, R. S. Missouri, 1939, and con-
sists of an annual salary and the fees earned on cases
brought to the county on change of venue from other coun-
ties.

The Constitution of Missouri, Section 8, Article XIV,
prohibits increasing the compensation of any officer dur-
ing the term for which he shall have been elected. This
applies to the duties of the office and those duties which
are incident to the performance of the official duties.
Little River Drainage Dist. v. Lassater, 325 Mo. 493, 1. c.
502:

"Appellant contends that Section 4575 authorizes an increase in the compensation of township collectors during their terms of office and, hence, violates Section 8, of Article XIV, of the Missouri Constitution, which provides that 'the compensation or fees of no state, county or municipal officer shall be increased during his term of office; . . .'. As neither county collectors nor township collectors, in respect to their services, in collecting the taxes of drainage districts, perform any of the duties of state, county or municipal officers, it would seem that the fixing of their compensation for rendering such services to drainage districts is not controlled by Section 8, Article XIV, of the Constitution.

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. (State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864; State ex rel. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. Barrett v. Boeckler Lumber Company, 302 Mo. 187, 257 S. W. 453."

It would appear that if the care and custody of funds which are the subject of litigation is one of the duties of the clerk or is incident to the duties of the clerk, no compensation could be allowed for this service as it would conflict with the provisions of Section 8, Article XIV, of the Constitution. However, if that service would not be one of the duties of the clerk, it might be possible that an additional fee could be allowed. No Missouri cases have been

found touching upon this subject. However, in Vol. 11 of Corpus Juris, at page 871, par. 40, is found the following:

"If there is a statute authorizing it, the clerk is entitled to a commission on funds handled; * * *."

In support of this statement is cited the Tennessee case of Louisville & Nashville R. Co. v. Boswell, 104 Tenn. 529, 58 S. W. 117. This was a condemnation case in which the value fixed for the condemned land was paid into court and held by the circuit clerk. The judge awarded the clerk a fee for his services in connection with the fund. On a motion to retax the costs the Supreme Court of Tennessee ruled that the clerk was not authorized to charge a fee for a service of this kind. From this case we quote at length:

"It is said the court allowed the commission under section 6391, Shannon's Code, viz.: 'The court may make allowances to the clerk, or other person acting as trustee, receiver or commissioner under the appointment of the court, when no fees are fixed by law.' In this case the clerk was not acting in the capacity of trustee, receiver, or commissioner, under the appointment of the court, when he received this money, but he received it as clerk. Section 1859, Id., under the head of 'Condemnation Proceedings,' provides, viz.: 'If no objection is made to the report it is confirmed by the court and the land decreed to the petitioner upon payment to the defendants or to the clerk for their use of the damages assessed.' So that it is obvious that this money was received by the defendant in error in his capacity as clerk. The contention of defendant in error that the payment to him of the money for the use of the defendant makes him trustee or receiver, without formal appointment by the court so as to entitle him to the commission,

is unsound. But it is insisted that, independent of the foregoing statute, the allowance of said commission was within the discretion of the court, under section 4962, Id., viz.: 'And if any case shall occur not directly or by fair implication embraced in the express provisions of the law the court may make such disposition of the costs as in its sound discretion may seem right.' It will be observed that this section has reference to the disposition of costs. In construing this section in Perkins v. State, 9 Baxt. 2, this court said, viz.: 'This section only authorizes the court to exercise its discretion in adjudging costs, as between the parties, which have already accrued, if any case should occur where the law has not directed how they shall be adjudged, but confers no power to allow costs to officers, which the law has not allowed.' The law has nowhere allowed the clerk a commission in such a case, as part of the costs; and the court, under this section, has no discretion to allow it. As said by this court in Mooneys v. State, 2 Yerg. 578: 'Costs are created by statute. Unless there be some law to authorize it, the court cannot ex officio give costs against any one.' The motion to retax is sustained, and the commission is disallowed."

From the statement in Corpus Juris and from the Boswell case, supra, it is the conclusion of the writer that the custody by the circuit clerk of money which is the subject of litigation and to be disbursed upon the order of the circuit court would be one of the duties incident to his office, and for which no fee could be retained by the clerk, because any such retention of fees would be in conflict with the provisions of Section 8, Article XIV, of the Constitution and Section 13408, R. S. Missouri, 1939.

Continuing the discussion further, by the provisions of Section 13436, R. S. Missouri, 1939, the clerk of the circuit court is required to charge, collect and turn in all fees which may be properly chargeable for his services. The follow-

ing brief excerpt is taken from Section 13436:

" * * * And monthly, such clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every clerk shall be liable on his official bond for all fees collected by law. * * * "

Sections 13407, 13409 and 13410, R. S. Missouri, 1939, prescribe the fees which the clerk must charge, collect and account for. A careful examination of these sections reveals that there is no charge authorized to be made by the clerk for his services as custodian of funds.

The law is well settled that unless compensation is provided by statute, no compensation may be allowed. Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Honorable W. R. Tilson

-6-

December 16, 1943

CONCLUSION

It is the opinion of the writer that no fee may be charged or retained by the clerk of the circuit court for the handling of funds impounded in his hands by order of court, awaiting order of distribution by the court.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

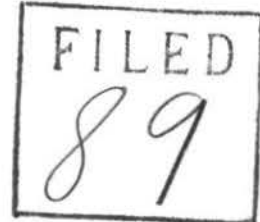
ROY McKITTRICK
Attorney General

WOJ:HCR

ROADS AND BRIDGES: Township board cannot lease road machinery belonging to road district to be used outside of the road district in the township, under township organization.

January 5, 1943

Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of January 2, 1943, which reads as follows:

"Your opinion is requested upon the following:

"Does a Township Board have the right to lease its road machinery (in this case a caterpillar tractor) to an individual, who proposes to use it on some construction project, in which the Township is not even remotely connected or interested?

"The facts briefly are as follows: two members of a Township Board in this County, without even consulting the other member lease a valuable tractor to an individual, who has taken it to some place in South Missouri, for use on a road project. There was no written contract entered into between the Township and lessee, and no record of the transaction was made in any minutes.

January 5, 1943

"I have given it as my opinion, that the Board members acted wholly without authority. The statute (Section 8818, R. S. Mo. 1939) provides that the tools of a district should not be loaned to any one except persons doing free work upon the roads of the district. I can find no authority, statutory or otherwise, for the action of the Board.

"If it is your opinion that the leasing of the equipment was improper, I then ask that you advise me who should institute an action to recover the machinery, provided the lessee refuses to surrender it and the Township Board refuses to attempt to get it back until the alleged rental period has expired. Also, what form of action should be instituted."

In answering the above request, and since you use Section 8818 R. S. Missouri, 1939, therein, we are presuming that the road district is a road district provided for under Article 17, Chapter 46, R. S. Missouri, 1939, which applies to common road districts, in counties under township organization, and not to Article 18, Chapter 46, R. S. Missouri, 1939, which applies to special road districts and benefit assessments in counties under township organization.

Section 8813 R. S. Missouri, 1939, reads as follows:

"All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organization, or in conflict with the provisions of this law."

Honorable D. D. Thomas, Jr.

-3-

January 5, 1943

Under this section the general road law of all counties applies, unless the counties are limited to counties under township organization, or are in conflict with the provisions applicable to road districts under township organization.

Under Section 8814 R. S. Missouri, 1939, the township board of directors form road districts and appoint road overseers, where, under the general road law, which applies to counties not under township organization, the county court defines the road districts and appoints the road overseers.

Section 8818, supra, to which you refer in your request, reads as follows:

"The overseer shall not employ any member of the township board nor enter into any contract for road work, material, tools, teams, nor purchase any machinery or material for the use of the road district from any member of the board or a member of his own family, either directly or indirectly, nor in any way use the funds of the district so as to become the beneficiary in the disbursement of the same. The tools of the district shall not be loaned to any person, except persons doing free work upon the roads of the district."

Under the above section the overseer is empowered to loan the tools of the district, but nothing is said in regard to the machinery. This section provides that

Honorable D. D. Thomas, Jr. -4- January 5, 1943

the overseer shall not enter into any contract for road work, material, tools, teams, or purchase any machinery or materials either from members of the township board or a member of his family, directly or indirectly. It mentions therein machinery and tools as a different class of property, but only mentions that the tools shall not be loaned to any person except to persons doing free work upon the roads of the district. This is an express prohibition, and impliedly by act of law, as hereinafter set out, prohibits the loaning or leasing of machinery such as a tractor.

The powers of township boards are set out in Section 13933 R. S. Missouri, 1939, which reads as follows:

"Each township, as a body corporate, shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of this state; second, to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

Also, Section 13934 R. S. Missouri, 1939, specifically forbids any other act, except those that are set out in Section 13933, supra. Section 13934, supra, reads as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

In a careful research of Section 13933, supra, we fail to find any authority for the township board to loan machinery to be used by a person outside of the road district. Township boards can only perform those duties authorized by statute in the same manner as duties authorized by members of the county court.

In the case of Jensen v. Wilson Tp., Gentry County, 145 S. W. 2d 372, the court, in stating this rule, said, in pars. 3-5:

" * * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S. W. 794. * * * * "

January 5, 1943

In your request you also ask what form of action should be instituted. You also state that the township board may refuse to get the tractor back until the alleged rental period has expired. If such is the case, the taxpayers of the district may, after proper demand upon the township board, bring an action in replevin to recover the tractor and set up in the petition their special interest as taxpayers in the ownership of the tractor. It was so held in the case of *Smith v. Hendricks*, 136 S. W. (2d) 449, pars. 4-5, where the court said:

"It is a familiar principle of equity that if A. has a cause of action at law, which he alone can assert, but in which B. has an interest, and A. refuses to bring the suit at law, B., by alleging a proper demand and a refusal of A. to bring the suit, can successfully maintain an action in equity to recover for A., because B. is interested in the recovery and it is A.'s duty to bring the suit.

"There are a number of such cases in this and other states relating to corporate actions where the directors of a corporation have wasted the assets and refused to sue in the name of and for the corporation. Any stockholder in the corporation, on behalf of himself and the other stockholders, can maintain the suit for the benefit of the corporation. *Hannerty v. Standard Theater Co.*, 109 Mo. 297, 19 S. W. 82, and numerous cases following it. On the same principle, a taxpayer in a public corporation can, in

a proper case, bring such a suit on behalf of himself and other taxpayers to recover on behalf of the corporation. This has been repeatedly decided by the Missouri courts."

Section 4483 R. S. Missouri, 1939, partially reads as follows:

"If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called, shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal ap-

appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; * * * * *"
(Underscoring ours.)

This section specifically states:

" * * * any executive officer or member of any executive department of any city, town or county in this state, * * * or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, * * shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, * * * shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; * * * * *"

Under the above partial section, 4483, supra, a criminal action may be commenced for the unlawful unauthorized disbursement and disposition of the tractor.

Honorable D. D. Thomas, Jr.

-9-

January 5, 1943

CONCLUSION

It is, therefore, the opinion of this department that the township board of Carroll County, Missouri, is not authorized to lease a tractor belonging to the township to an individual who has taken it to some place in South Missouri on a road project.

It is further the opinion of this department that if the township board refuses to bring an action to recover the tractor, then the taxpayers may bring an action to replevin the tractor, in which they have a special interest, by first making a demand on the township board to so act, and upon refusal of the board, to bring an action in the name of one or more taxpayers.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

ROY MCKITTRICK
Attorney General of Missouri

WJB:RW

CONSTITUTIONAL LAW: Amendments to legislative acts must conform to the original purpose of the act, under Art. IV, Sec. 25, Constitution of Missouri.

February 11, 1943.



Honorable Murray E. Thompson
House of Representatives
Jefferson City, Missouri

Dear Mr. Thompson:

The Attorney-General wishes to acknowledge receipt of your letter of February 10th in which you request an opinion of this Department. Your request, omitting caption and signature, is as follows:

"Enclosed is a copy of House Bill No. 67 and your attention is particularly directed to the title. Some members desire to offer an amendment to this bill increasing the license fees on motor trucks which is now covered in Section 8369 of the Revised Statutes of Missouri, 1939.

"Will you kindly give me an opinion as to whether or not such an amendment would change the original purpose of the enclosed bill in violating Article 4, Section 25 of the Missouri Constitution."

The request in this case is based on an interpretation of Article IV, Section 25, of the Constitution of the State of Missouri, and consequently we will cite such provision, as follows:

"No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

As stated in your request, the particular part of House Bill 67 which is in question, is the title. Consequently, we will cite the title of such act, as follows:

"An Act to amend Article 1 of Chapter 45, of the Revised Statutes of Missouri, 1939, relating to the regulations and license fees of motor vehicles by repealing Section 8405 relating to the regulations as to width, height and length of motor drawn or propelled vehicles and by enacting a new section in lieu thereof relating to the same subject, to be known as Section 8405; and further amending the said article by repealing Section 8406 relating to the regulations as to weight of motor drawn or propelled vehicles or combinations thereof and by enacting a new section in lieu thereof relating to the same subject, to be known as Section 8406; with an emergency clause."

This title clearly provides that House Bill No. 67 is a measure intended to regulate the width, height and length of motor drawn or propelled vehicles and is intended to repeal Sections 8405 and 8406 of the Revised Statutes of Missouri for 1939. These two sections regulate the width, height, length and weight of motor vehicles in the State of Missouri, and it is clearly the intention of the framers of House Bill No. 67 that such House Bill is an act to repeal such sections and is not an act for the purpose of licensing motor vehicles.

Section 8369, R. S. Mo., 1939, is a section entitled "Registration of owners - fees," and provides for the different amounts to be paid for licenses for different types of motor propelled vehicles. In other words, it would appear that Sections 8405 and 8406 of the Revised Statutes are regulatory measures and that Section 8369 of the Revised Statutes is a revenue measure. All of these sections of the statutes are contained in Article 1, Chapter 45, R. S. Mo. 1939, but we do not feel that an amendment increasing the license fees of

motor trucks, which is now covered in Section 8369, R. S. Mo. 1939, would be within the original purpose of House Bill No. 67 as evidenced by the title.

In State ex rel. McCaffery et al. v. Mason, 155 Mo. 486, 1. c. 502, we find the following language:

"Passing now to other sections of article 4 of the Constitution said to have been violated in the passage of the Nesbit law: We look at section 25 which provides that: 'No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose.' This purpose means the general purpose of the bill, not the mere details through which and by which that purpose is manifested and effectuated. Were this otherwise, it is easy to see that the process of legislation would be seriously hampered and embarrassed by every amendment which might be offered, however germane it might be to the idea as formulated in the first draft of the bill. In addition to that, section 25 must be considered in connection with section 37 aforesaid, and inasmuch as no protest was offered based on the prohibition of section 25 in relation to substitution, omission or insertion, which are but other forms of amendment, it must needs follow that in contemplation of law no unwarranted substitution, etc., occurred pending the passage of the bill."

We feel that applying the rules laid down in this case that an amendment of the kind contemplated would change the purpose of House Bill No. 67 and would not change the mere details through which and by which the general purpose is

Feb. 11, 1943.

manifested and effectuated.

Therefore, it is the opinion of this Department that an amendment to House Bill No. 67, as offered, increasing the license fees on motor trucks, would change the original purpose of such bill and would be in violation of Article IV, Section 25, of the Missouri Constitution.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

COUNTY COURTS: Court may issue warrants on funds
ROAD BOND TAX FUNDS: anticipated from taxes authorized by
a bond issue; constitutionality of
Section 13763; special road districts
may not expend any of such funds; manner
of determining the amount of anticipated
revenue from such taxes.

March 23, 1943

Mr. W. E. Thompson
County Clerk
Lewis County
Monticello, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein
you submitted the following:

"As provided by section 13763 R. S. Mo.
1939, the County Court of Lewis County
called an election to be held on March
10th, 1943. This order was made after
the petition required had been filed,
and the order called for a 10 cent levy
on each \$100.00 valuation for a period
of 10 years. The proposition carried by
a vote of over two thirds majority of the
qualified voters voting at said election.

"I would like for you to furnish me an
opinion on the following questions:

"(1) Can the County Court issue warrants
on this anticipated fund after it is spread
of record at the May Term?

"(2) Do you consider this constitutional
(taking for granted that all matters con-
cerned with the election were in due form?

"(3) Would the Special Road Districts in
the County receive any of the money derived
from this levy?

"(4) Who would determine the amount of anti-
cipated revenue to issue warrants against?

"(5) How would the amount of anticipated revenue be arrived at?"

Section 13763, to which you refer in your letter, provides in part as follows:

"The county court of any county in the state of Missouri, of its own motion may, and upon petition signed by not less than one hundred resident taxpayers of such county, filed and presented to such court, asking that a proposition be submitted to the qualified voters of the county to increase the rate of taxation within the limits prescribed by section 12 of article X of the Constitution of Missouri, for the erection of a court house or jail, or for the grading, construction, paving or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein, shall order that an election be held within forty-five days after making such order to determine whether or not the rate of taxation shall be increased. Said order shall specify the purpose for which the money to be derived from such increased rate of taxation shall be used and shall also specify the total or aggregate sum that in the judgment of the county court is necessary for such purpose and said order shall specify the rate per annum of such increase and the number of years it shall continue. * * * * * If two-thirds of the qualified voters of the county voting at such election on such proposition shall vote in favor of said increased tax it shall be the duty of the county court to cause the same to be levied and assessed against all property in said county by law made subject to taxation for state and county purposes and cause the same to be collected at the same time and in the same manner that state and county taxes are collected, and said tax shall be kept as a special fund for the purpose or purposes

voted and shall be expended under the direction of the county court for the purpose for which it was voted and none other: Provided, that if the county court deems it advisable they may issue warrants against said tax in advance of its collection."

This is an enabling act to Section 12 of Article X of the Constitution of Missouri. The portions of which section that pertain to your question are as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special: Provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of court

house or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein; * * * * *

(1)

On your first question, which is, can the county court issue warrants on this anticipated fund after it is spread of record at the May Term, we find no provision in the Constitution which would prohibit the General Assembly from granting such authority.

Section 1 of Article IV of the Constitution authorizes the Legislature to enact any legislation not contrary to the Constitution.

Searching through the statutes you will find where counties and cities, on a number of occasions, have been granted authority to issue warrants in anticipation of the current revenue. We particularly have in mind the Budget Act of 1933.

The last sentence in said Section 13763, R. S. Mo. 1939, reads as follows:

"* * * Provided, that if the county court deems it advisable they may issue warrants against said tax in advance of its collection."

Therefore, in answer to your first question, it is the opinion of this department that the county court may issue warrants against this anticipated tax fund after it has been determined how much the tax will amount to.

(2)

On your second question, which is, do we consider this statute Constitutional, we start with the presumption that all statutes are Constitutional.

As stated above, Section 13763, is an enabling act to Section 12, Article X of the Constitution. We do not find any provision of the Constitution which would prohibit the General Assembly from enacting such legislation.

Therefore, in answer to your second question, we think this section is Constitutional.

(3)

On your third question, of whether or not Special Road Districts in the county would receive any of these tax funds, we find that said Section 13763 provides that the county courts shall expend this money.

Possibly the impression that the Special Road Districts may be entitled to demand and receive the portions of these taxes raised from properties in such districts is obtained from various statutes relating to Special Road Districts, which provide that such districts shall receive all road taxes raised on properties in their particular district.

From your request we cannot ascertain under what Article your districts are organized, but for the purpose of this point we refer you to Section 8691, R. S. Mo. 1939, which relates to eight-mile road districts and provides that taxes arising from and collected and paid on property lying and being within a special road district shall be apportioned and set aside to such special road district. Our courts, on a number of occasions have held that such road districts are entitled to have these taxes apportioned to them. State ex rel. Special Road District v. Barry, 302 Mo. 280; State ex rel. Special Road District v. Burton, 283 Mo. 44.

Comparing the provisions of said Section 13763 with those of Section 8691, it would seem that there is a conflict in these sections, in that said Section 13763 provides that the county court shall expend the tax money raised under authority of that section, while Section 8691 provides that all moneys raised on properties in a special road district shall be apportioned to that district.

The history of these acts is that Section 13763 was enacted in 1929 (Laws of Mo. 1929, page 416), while Section 8691 was enacted in 1913 (Laws of Mo. 1913, page 675).

Rules of construction which might be applicable here, are as follows:

59 Corpus Juris, 1051, Sec. 621, states the rule of construction of conflicting statutes, as follows:

"Statutes in pari materia, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. But if there is an unreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute."

State ex rel. Halsey v. Clayton, 226 Mo. 292, follows and applies this rule.

Also, the rule that two statutes relating to the same subject must be read together and the provisions of one having special application to a particular subject, will be deemed a qualification or "exception" to another statute general in its terms. This rule is applied in Eagleton v. Murphy, 156 S. W. (2d) 683.

These two statutes deal with the general subject matter of road taxes, but Section 13763 deals with road taxes raised under a bond issue by virtue of the provisions of that section, and we think it would be classed as a special statute and an exception to the other statutes relating to general road taxes. Under this rule of construction we think the courts would hold that this is a special statute and that the county court is the body which dispenses these taxes.

We are, therefore, of the opinion that Special Road Districts in the County would not be entitled to have any of these funds apportioned to them for expenditure on the roads in their districts, but that the County Court would expend this money.

(4) (5)

On the last two questions of who would determine the amount of anticipated revenue to issue the warrants against and how would the amount of anticipated revenue be arrived at, you will note that Section 12 of Article X of the Constitution prescribes that the value of the property which is to be taxed for the purpose of raising this revenue is "ascertained by the assessment next before the last assessment for state and county purposes." The courts have held that this means the assessment before the last completed assessment. State ex rel. v. Hackman, 294 Mo. 190..

Applying this rule, the last completed assessment was made in 1941 and the assessment next before that would be in 1940. So that would be the basis for the valuation to be used in fixing the rate for the tax for this year.

Under said Section 12, Article X, the rate of levy to raise the required tax is fixed by the County Court before, or at the time of incurring the indebtedness.

The basis for the rate having been made, and the rate having been fixed by the County Court, then, by multiplying the rate by the valuation as a base ascertained as aforesaid, the County Court is able to determine the amount of taxes which it may anticipate will be collected this year and it may issue warrants in anticipation thereof.

Therefore, answering your fourth and fifth questions, it is the opinion of this department that the County Court determines the amount of anticipated revenue to issue warrants against, and that such amount of anticipated revenue may be arrived at by multiplying the rate by the valuation as a base, which valuation is ascertained from the assessment next before the last assessment for state and county purposes.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

TWB:CP

SCHOOLS: Directors cannot invest surplus funds in United States Bonds.

May 4, 1943



Mr. D. D. Thomas, Jr.
Prosecuting Attorney
Carrollton, Missouri

Dear Sir:

We have your letter of recent date, which reads, as follows:

"I respectfully request an opinion upon the proposition of whether or not the Board of Directors of a School District can invest surplus money, now in the incidental and teachers' fund, in United States Bonds."

The method of loaning surplus funds of a school district is governed by Sections 10434 and 10435, R. S. Missouri, 1939, which read as follows:

"Sec. 10434. Whenever it shall be found that any school district has any surplus funds in the county treasury, the directors of such school district may make application, in writing, to the county court, setting forth that school funds are accumulating beyond the wants or necessities of such district. Upon such application, it shall be the duty of the county court to cause such funds to be loaned for the use and benefit of such school district."

May 4, 1943

"Sec. 10435. Such school funds shall be loaned at the same rate of interest and in the same manner as township school funds are loaned: Provided, that no school tax shall be levied in such district other than for incidental expenses during the time for which such surplus fund is sought to be loaned; and provided further, that a free public school shall be maintained in such school district for at least eight months in each year."

It will be seen from the foregoing that if there is a surplus of funds belonging to any district, the directors may request the county court to loan such funds, and the county court may loan said funds in the same manner as township school funds are loaned. This office has ruled that the county court cannot invest surplus school funds in Defense Bonds. Said ruling was contained in an opinion dated January 14, 1942, and addressed to Honorable David A. Dyer, Prosecuting Attorney, St. Charles, Missouri, a copy of which is enclosed herewith.

CONCLUSION

It is, therefore, the opinion of this department that the board of directors of a school district cannot invest surplus money of the incidental and teachers' fund in United States Bonds.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

OFFICERS: Salaries of elected officers of city operating under special charter may, by ordinance, be reduced.

May 12, 1943



Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 28, 1943, in which you request an opinion upon a question involving reduction of salaries of city officers. I quote the first paragraph of this letter, which reads as follows:

"I respectfully request your opinion upon the following proposition of whether or not a Council of a Town under Special Charter, may by Ordinance, reduce the salary of an elective official of such Town."

The provisions of our statutes which concern themselves to cities or towns under special charter may be found in Chapter 38, Article 14, of the Revised Statutes of Missouri, 1939. At Section 7442 R. S. Missouri, 1939, we find that portion of the statutes which prescribes that ordinances must conform to the State law and we further cite Ex Parte Tarling, 241 S. W. 929. Then, at Section 7447 R. S. Missouri, 1939, we find a provision that certain officers may be elected in cities under special charter. These sections above are cited for your information as we deem it necessary so to do before taking up the question involved, but they are not quoted in full because of their length.

At the outset it is necessary to assume certain facts in this connection. Not having a copy of the special charter and the provisions of that charter before me, particularly the portion concerning the enactment for repeal of ordinances, we assume that under your special charter the city of Carrollton has the right to enact and repeal ordinances. We further assume that Carrollton has never operated other than as a city under a special charter. While the city has the right

to take advantage of those articles relating to cities of the third class, it has not done so. See the Constitution of Missouri, Article IX, Section 7, page 132c. Also, Kansas City et al v. Scarritt, 127 Mo. 642.

Before discussing the matter as to whether the compensation of officers may be decreased, it is well to note that there is a direct provisions in our statutes prohibiting the compensation of officers being increased during their term of office. We refer to the Constitution of Missouri, Article XIV, Section 8, page 165c, which reads as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

See Lycett v. Wolff, 45 Mo. 489, l. c. 496, and Smith v. Pettis County, 345 Mo. 839, 136 S. W. (2d) 288.

In examining the authorities bearing upon this question we find in point the following:

In the case of Lycett v. Wolff, 45 Mo. 489, l. c. 496, the court said:

" * * * * Now this salary, by reason of the constitutional inhibition (Const. of 1875, art. 14, sec. 8), could not; probably, be increased during the plaintiff's term of office, but we do not see why a falling off in the population of the county, if the census subsequently taken so showed, might not, under the law of 1874, work a decrease. Hence, the census of 1880 was competent and relevant testimony."

In the case of Smith v. Pettis County, 345 Mo. 839, l.c. 844, 136 S. W. (2d) 288, the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. (Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. (2d) 182.) * * * * *"

The court held, in the case of Givens v. Daviess County, 17 S. W. 998, 1. c. 999, 107 Mo. 603, 1. c. 608, that:

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. Gammon v. LaFayette Co., 76 Mo. 675; Koontz v. Franklin Co., 76 Pa. St. 154; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Walker v. Cook, 129 Mass. 579; Knappen v. Supervisors, 46 Mich. 22; City Council v. Sweeney, 44 Ga. 465. In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v. Gear, 27 N. J. L. 278; United States v. Fisher, 109 U. S. 143."

In the case of Holman v. City of Macon, 137 S. W. 16, 1. c. 17, we find the following:

"1. Municipal Corporations (Sec. 120*)—
Ordinances - Construction.

"City ordinances are to be governed by the same rules of interpretation as apply to legislative enactments.

"(Ed. Note. - For other cases, see
Municipal Corporations, Cent. Dig.
Secs. 274-280; Dec. Dig., Sec. 120.*)

"2. Municipal Corporations (Sec. 162*)-
Ordinances - Construction - Compensation
of Officers.

"Where the statutes invest a municipal
corporation with the power to regulate
and fix the compensation of municipal
officers, the ordinances enacted for
that purpose must be treated as though
passed by the Legislature itself.

"(Ed. Note. - For other cases, see
Municipal Corporations, Dec. Dig. Sec.
162*)

"3. Officers (Sec. 98)- Compensation -
Statutory Provisions.

"A public officer cannot demand any com-
pensation for his services not specifically
allowed by statute, and statutes fixing
such compensation must be strictly con-
strued."

In the case of *The City of Kansas v. White*, 69 Mo. 27,
1. c. 27, the court held:

" * * * By the charter, the city had au-
thority to pass ordinances to suppress
gaming. It, of course, had authority to
repeal them when passed. * * * * *"

In 43 C. J., Sec. 887, page 562, we find the following:

" * * * Subject to limitations herein-
after considered, the power of a munici-
pal council to repeal ordinances is by
necessary implication as broad as the
power to enact them, * * * * *"

In 43 C. J., Sec. 888, page 563, we find:

"The power to repeal ordinances cannot be exercised by a municipality where the effect of such repeal would be to interfere with vested rights acquired under the ordinance which it is sought to repeal. But an ordinance may be repealed at any time before compliance with the steps necessary to render it effective, because in such case no one is deprived of any vested right,
* * * * *

In 43 C. J., Sec. 890, page 564, we find:

"The simple and direct mode of effecting repeal of an ordinance is by a later ordinance passed by the common council, enacting that the former ordinance, describing it, is hereby repealed."

In McQuillin Municipal Corporations, Second Edition, (Revised Vol. 2), Sec. 871, page 1127, we find the following:

"Specific grant of power to amend or repeal ordinances is not necessary in view of the general rule that power to enact them unless restricted, implies power to repeal them. Thus an ordinance fixing the fiscal year of a municipal corporation is an administrative measure and is subject to repeal. Generally speaking, all ordinances are subject to repeal. The corporation cannot abridge its own legislative powers and pass irrevocable ordinances. The members of the legislative body are trustees of the public, and the tenure of their office impresses their ordinances with liability to change. And where an ordinance granting rights to the streets expressly reserved the power of repeal, reasons which induced the passage of a repealing

ordinance cannot be inquired into by the courts, to affect its validity. In the absence, therefore, of a valid provision to the contrary the council of a municipal corporation having the authority to legislate on any given subject may exercise that authority at will by enacting or repealing an ordinance in relation to such subject-matter. Such in varying form is the statement of the rule when the ordinance is not a contract, or one that is, from its nature, exhausted from a single exercise. The efficacy of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it."

In *Municipal Corporations*, by Dillon, Fifth Edition, Vol. 1, at page 157, we find the following:

"When the Constitution by its terms recognizes cities and other municipalities existing under special charters as a special class by providing that the legislature shall make provision by general laws whereby any city, town, or village organized under a special or local law may become subject to the general laws relating to such corporation, such corporations form a separate and independent class recognized by the Constitution. * * * * *

(See also, *Rutherford v. Hamilton*, 97 Mo. 543; *Kansas City v. Stegmiller*, 151 Mo. 189 and *Elting v. Hickman*, 172 Mo. 257.)

CONCLUSION

From the above and foregoing, the writer is of the following opinion:

Honorable D. D. Thomas, Jr.

(7)

May 12, 1943

That the members of the city council are public officers, and, as such are entitled to that salary provided by ordinance of the legislative council. If a new council desires to pass an ordinance repealing one under which salaries are now being paid, and they enact one reducing the salaries now being paid, we find that there are no constitutional inhibitions preventing the repealing of the former ordinance and the adoption and passage of a new one which said new ordinance reduces salaries of the council members.

Respectfully submitted

L. I. MORRIS
Assistant Attorney General

APPROVED BY:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

COUNTY COURT: Authority to settle or compromise for an
BONDS: amount less than sued for on surety bond.

November 26, 1943

Honorable William S. Thompson
Prosecuting Attorney
Mercer County
Princeton, Missouri



Dear Sir:

This will acknowledge receipt of your request for
an opinion under date of November 20th, 1943, which reads:

"Where action is pending in the Circuit Court wherein the State of Missouri ex rel Mercer County, Missouri, seeks to recover from the sureties on the official bond of the County Treasurer sums alleged to be wrongfully converted by the Treasurer is there legal authority for the compromise of such action with the approval of the Circuit Court by which compromise the plaintiff accepts a sum of money less than amount sued for in the action?"

"It has just come to my knowledge that such an offer of compromise may be offered in the suit wherein the State of Missouri ex rel Mercer County, Missouri, is plaintiff, and Cecil E. Ogle et al are defendants, which suit is set for trial on Monday, November 29th 1943.

"Since the suit will be definitely for trial on that date I am compelled to ask for your opinion prior to that date. I regret having to ask for this opinion in so short a time."

We seriously doubt if this opinion can be officially approved in time to reach you by November 29th, 1943, as re-

requested in your letter. However, we shall do the best we can by that time.

In rendering this opinion we are assuming that you and the County Court seriously doubt the solvency of the sureties upon the surety bond of the Treasurer and are of the opinion that it would be advisable and beneficial to the County under the circumstances to enter into a settlement, or compromise, for an amount less than you are attempting to recover in your suit against the sureties, with the approval of the Circuit Court wherein the action against the sureties is now pending.

Under Section 36, Article VI of the Constitution of the State of Missouri, the County Court is vested with jurisdiction to transact all county and other business as provided by law, and reads:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The Legislature, in fulfilling its duty, has put into effect such power as is vested in the county by virtue of Section 36, Article VI, supra, by enacting Section 2480, R. S. Mo. 1939, which reads:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Section 13764, R. S. Mo. 1939, further provides: that whenever notes, bonds, bills, contracts, covenants, agreements or writings made whereby any person shall be bound to any county for the payment of money or any debt or duty, the county shall be vested with all rights, interests and actions which would be vested in any individual in any such contract made directly with him. Section 13764, supra, reads as follows:

"All notes, bonds, bills, contracts, covenants, agreements or writings made whereby any person shall be bound to any county, or to the inhabitants thereof, or to the governor, or to any other person, in whatever form, for the payment of money or any debt or duty, or the performance of any matter or thing, for the use of any county, shall be valid and effectual to vest in such county all the rights, interests and actions which would be vested in any individual, in any such contract made directly to him."

The foregoing statutory provision is very broad and gives to the county court the same rights as is vested in any individual in such contract made directly to him.

Under Sections 13765, and 13767, R. S. Mo. 1939, the county may sue and be sued.

We think the Supreme Court, in the case of The St. Louis, Iron Mountain & Southern Railway Company v. Anthony, 73 Mo. 431, l. c. 434, deals with this principle of law, and states as follows:

"The county had sued plaintiff for taxes, and recovered a judgment in the circuit court of Washington county, which this court reversed and remanded, and, thereupon, a compromise was agreed upon between the parties, by the terms of which plaintiff was to pay a given sum in settlement,

and has so far complied with the agreement, and the collector, in disregard of that agreement, was proceeding to collect the original amount and interest and penalties.

"It is now contended that the county had no authority to make the compromise in question, or any compromise whatever. We are not of that opinion. The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise, questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the supreme court of New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in the Supervisors of Chenango County v. Birdsall, 4 Wend. 453."

It would appear from the foregoing decision that the County Court has the authority to make a settlement or compromise on the best terms available under the circumstances, after suit is instituted for recovery of money, if there be considerable doubt as to the possibility of recovering the full amount sued for; of course, at all times acting in good faith for the best interests of the county.

It is true County Courts are not general agents of the county and their powers are limited and defined by statute, also, any act committed outside such statutory authority

will be considered void.

In *Morris v. Karr*, 114 S. W. (2d) 962, 1. c. 964, 342 Mo. 179, 1. c. 183, the court said:

"In *Sturgeon v. Hampton*, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

Notwithstanding the above decision, a well established principle of law relative to the jurisdiction of county courts, we believe the County Court, as has frequently been held of other agencies, under statutory authority not only has those powers granted by statute, but also those powers which may be fair and naturally implied from such expressed statutory rights.

In *Sheidley v. Lynch*, 95 Mo. 487, 1. c. 497, the court, in so holding, said:

"So in the case of *H. & St. J. R. R. Co. v. Marion County*, 36 Mo. 303, it is said that the county court is the agent of the county, and may lawfully and of right do whatever is necessary to carry out and execute the trusts reposed in it. So in the case of *Walker v. Linn County*, 72 Mo. 650-3, it is said: 'That a county court is invested with such powers only as are expressly conferred upon it by statute, or such as may be fairly and necessarily implied from those expressly granted, we think cannot be questioned.' * * * * *"

In Hooper v. Ely, 46 Mo. 505, we find a decision which probably throws some light upon this question. In that case the sheriff and collector of the county had absconded. The court held that the county could not reimburse one of the sureties for going after the officer, since the sureties were abundantly responsible for any amount the sheriff and collector owed the county, and such authority did not come within the county court's jurisdiction to control and manage the real and personal property of the county, for the reason that such expenditure was for the personal benefit of the sureties and not the county. The court did, however, hold that if the liability was not secured and, by bringing the sheriff and collector back, it did help recover the loss, the expenditure might have been justified. In so holding the court at l. c. 507 said:

"* * * It may be admitted that if the liability had not been properly secured to the county, and there was a reasonable prospect of obtaining for the county what was actually obtained by the sureties, the County Court, as an incident to its power spoken of, and to its duty to enforce settlements with collectors, might incur reasonable expense in the pursuit of the defaulter. But in the case under consideration the county authorities did not act for the county, but for the signers of the bond alone."

Thereafter, in the above case, a suit upon the sheriff's and collector's bond was filed in the circuit court and a judgment was entered by consent for over \$5,000 with a stay of execution for twelve months, and an agreement that it might be discharged by county warrants. All of which indicates that some settlements and compromises have heretofore been sanctioned by the courts.

In 15 C. J. Sec. 287, page 586, we find the following approving settlements and compromises, and in part reads:

"* * * Also compromises and settlements of claims owing to the county, or litigation based on such claims, are generally upheld by the courts in the absence of a showing of fraud or collusion. * * *"

CONCLUSION

Therefore, it is the opinion of this department that if you and the County Court believe that the sureties on this bond of the Treasurer are not solvent and the County would benefit, under the facts and circumstances, by a settlement or compromise, with the approval of the Circuit Court such a settlement or compromise would be valid and binding.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

ARR:CP

LABOR: Construction of Section 5082, R. S. 1939, relative to the payment of discharged employees, and 5080 relative to the payment for discharge of employees.

March 16, 1943

Honorable Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri



Dear Sir:

In answer to your request for an official opinion from this office, in reference to the payment of wages of employees of corporations, we are submitting the following:

Your request consists of three questions.

I

Your first question reads as follows:

"Must a firm pay a discharged employee the day he is discharged, or may that firm avail themselves of a seven day waiting period?"

Section 5082 R. S. Missouri, 1939, reads as follows:

"Whenever any corporation doing business in this state shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to

March 16, 1943

longer employ; and such servant or employee may request in writing of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station or office where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station or office within seven days from the date it is so requested, then as a penalty for such non-payment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid: *Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.*" (Italics ours.)

This section first declares that whenever any corporation doing business in this State shall discharge, with or without cause, or refuse to further employ any employee, the unpaid wages shall become due and payable on the day of such discharge or refusal to longer employ. This provision in the first part of Section 5082, supra, is unambiguous, is in plain language, and there is no question but that the wages are due on the date of the discharge. Since the wages are due and are not paid, the employee may bring an action against the corporation for his wages, upon the refusal of the corporation to pay him at the time of his discharge. When the wording of a statute is unambiguous, it needs no construction. It was so held in the case of *State v. Thatcher*, 92 S. W. (2d) 640, 1. c. 643, where the court said:

" * * * First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied."

Honorable Orville S. Traylor (3) March 16, 1943

Since the first part of Section 5082, supra, declares the wages due and payable on the day of such discharge, it cannot be said that the corporation can delay payment of the wages.

Section 5082, supra, also contains a second provision, of which an employee may take advantage, that is, he may request, in writing, of his foreman, or the keeper of his time, to have the money due him, or a valid check therefor, sent to any station or office where a regular agent is kept, and, if the corporation does not send the money within seven days from the date it is so requested, then, as a penalty for such non-payment, the wages of the employee shall continue from the date of the discharge, or refusal to further employ, at the same rate until paid, for a period of not more than sixty days, unless an action therefor shall be commenced within that time. This alternative is not mandatory on the part of the employee, but he may request that it be sent by check to another regular agent of the company.

It may be assumed that it was the intention of the legislature that if a person was discharged by a corporation and intended to go to another city for employment, it would be better if he should request the check to be mailed within seven days to the other city than to bring an action within the city where he was discharged.

CONCLUSION

It is, therefore, the opinion of this department that whenever any corporation doing business in this State shall discharge, with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages, of any such servant or employee, then earned, at the contract rate without abatement or deduction, shall become due and payable on the date of such discharge or refusal to longer employ, and the employee upon such refusal may immediately file suit for the recovery of his wages.

It is further the opinion of this department, that the seven-day waiting period is for the benefit of the employee and not the corporation by which he has been employed. For that reason the corporation cannot avail itself of a seven-day waiting period.

Honorable Orville S. Traylor (4) March 16, 1943

II

Your second question reads as follows:

"If a firm discharges an employee, and the paying office is in a distant city, can that firm avail itself of the seven day waiting period, or must it pay at once, or continue employee on payroll until payment is made?"

In answer to this question, we refer you to our holding in answer to your first question.

In your second question you also inquire:

" * * * can that firm avail itself of the seven day waiting period, or must it pay at once, or continue employee on payroll until payment is made?"

Under our conclusion of the first question, we have held that the firm cannot avail itself of the seven-day waiting period and must pay at once. Relative to continuing the employee on the payroll until payment is made, we hold that that is not the law, as set out in Section 5082, supra. It was so held in the case of Quinn v. T. M. Sayman Products Co. 296 S. W. 198, where the court said:

"The instructions given on behalf of the plaintiff, concerning which defendant assigns error here, proceed upon the theory that under the statute plaintiff, if employed by the week, was entitled to recover by way of damages wages at the contract rate for the entire week commencing March 16th, less 56 cents paid by defendant, though he was discharged for cause, and that,

if defendant failed to pay plaintiff such wages within 7 days after request in writing so to do, plaintiff was entitled to recover by way of penalty wages at the contract rate from the date of his discharge until paid. The giving of these instructions shows a wrong construction of the statute on the part of the learned trial court. Obviously, the statute imposes a penalty, upon the discharge of an employee only for failure to pay the wages of such employee then earned at the contract rate, and not for failure to pay the wages which he would have earned if he had been permitted to continue in the service to the end of the definite period of time for which he was employed. It will be observed that the statute imposes the penalty though the employee be discharged for cause. The penalty is not imposed for discharging the employee, but for failing to pay the wages then earned at the contract rate. It is inconceivable that the statute intends to impose upon an employer a penalty for discharging an employee for cause, which would be the necessary result of the construction placed upon the statute by the learned trial court as shown by the instructions given for plaintiff. Such a construction of the statute would render it unconstitutional, and it is a settled rule of construction that a statute must be so construed, if so it may be consistent with its language, that it will not impinge upon constitutional guaranties. Moreover, this statute, being penal in its character, must be strictly construed." (Underscoring ours.)

In the above quotation we have underlined that particular part which specifically states that the penalty imposed is not for failure to pay the wages which would have been earned had the employee been permitted to continue in the service to the end of the definite period of time for which he was employed, but for failing to pay

the wages after receiving a notice requesting his wages.

This case also held that this statute being penal in its character must be strictly construed. Also, in the case of *Alexander v. Allison*, 224 S. W. 51, par. 4, the court, in construing this section said:

"The error in submitting to the jury the question of damages for failure to pay plaintiff the wages due, under the provisions of the Laws of Missouri of 1913, p. 175, was cured by the verdict. We have already stated that plaintiff did not prove a demand in writing, and the instructions should not have permitted the jury to find for more than the wages due. The jury, however, found only for the amount due, and defendant was not harmed by the error."

CONCLUSION

It is, therefore, the opinion of this department, that if a firm discharges an employee, and the paying office is in a distant city in this State, the firm cannot avail itself of the seven-day waiting period, and must pay at once, unless the employee requests in writing to his foreman, or the keeper of his time, that the money due him be sent to any station or office where a regular agent of the corporation is kept in this State.

It is further the opinion of this department, that unless the written request, as above set out, is made, the employee does not continue on the payroll until after the seven days have expired from the serving of the written notice above set out, and then he continues on the payroll, from the date of his discharge or refusal to further employ, at the same rate until paid, for a period not to exceed sixty days.

It is further the opinion of this department, that where the employee does not make the request in writing as above set out, he does not continue on the payroll, and

does not receive the benefit of the sixty days' wages from the time of his discharge, but merely has an action against the corporation for the actual wages due him at the time of his discharge.

III

Your third question reads as follows:

"If an employee voluntarily leaves his employment, can he demand immediate payment, except his pay within seven days, or may the employer make him wait until the next regular payday?"

The section applicable to this question is Section 5080 R. S. Missouri, 1939, which reads as follows:

"All corporations doing business in this state, which shall employ any mechanics, laborers or other servants, shall pay the wages of such employees as often as semimonthly. Such corporations shall either, as a part of the check, draft or other voucher paying the wages or separately, furnish the employee at least once a month a statement showing the total amount of deductions for the period."

And, Section 5081 R. S. Missouri, 1939, which reads as follows:

"Any corporation violating section 5080 of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty dollars, nor more than five hundred dollars, for each offense."

Under the above sections all business corporations doing business in this State shall pay the wages of their employees semimonthly, and, under Section 5081, supra, it is a misdemeanor if the corporations do not pay the wages of their employees semimonthly.

In a careful search of the statutes we do not find any law which allows an employee to sue a corporation for wages due him before the next regular payday. As described in Section 5080, supra.

Section 5080, supra, was held constitutional in the case of *Smith v. Townley Mfg. Co.*, 218 S. W. 870, par. 1-2, where the court said:

"The first paragraph of plaintiff's petition alleges that defendant is a Missouri corporation, and hence plaintiff's rights must be determined by the provisions of the 1911 act, supra.

"The above act of 1911 was held to be constitutional by our court in *banc* in *State v. Railroad*, 242 Mo. 339, 147 S. W. 118, and *State v. Railroad*, 242 Mo. 380, 381, 147 S. W. 130."

It was also held constitutional in the case of *The State v. Missouri Pacific Railway Company*, 242 Mo. 339, 1. c. 375, where the court said:

"Any law which would really prevent the defendant from operating its railroad as a common carrier, or which would render it impossible for such road to be operated so as to yield a return on the money invested in its construction or equipment, would doubtless be void; but after full consideration of all the facts and issues presented in this case, we are of the opinion that the semi-monthly payment

Honorable Orville S. Traylor

(9)

March 16, 1943

law applicable to all corporations,
is an appropriate and necessary police
regulation; and there is no sound rea-
son why it should prove injurious to
defendant or other corporations in our
State."

CONCLUSION

It is, therefore, the opinion of this department,
that if an employee voluntarily leaves his employment he
cannot demand immediate payment, but must wait until the
next regular payday.

Respectfully submitted

W. J. BURKE

Assistant Attorney General

APPROVED BY :

ROY McKITTRICK
Attorney General of Missouri

WJB:RW

LABOR: State statute regulating the hours of employment for women is superseded by the Railway Labor Act wherein it limits to interstate commerce.

March 16, 1943.

Mr. Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri



Dear Mr. Traylor:

The Attorney-General wishes to acknowledge receipt of your letter of March 15th in which you request an opinion of this Department. Your letter, omitting caption and signature, is as follows:

"You will find enclosed a letter, with enclosures, from Mr. Thos. T. Railey, Assistant to Counsel for Trustees of the Missouri Pacific Lines.

"In order to reply to this letter, we would appreciate your opinion as to whether state laws limiting hours of service of female employees are superseded by the Railway Labor Act and its regulations or not."

In order that we reach a decision in this matter we will first cite you to Section 10171, R. S. Mo. 1939, which provides in part as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of

establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: * * * * *

As can be seen from a study of this section, female employees working for an employer such as a railroad company, are not permitted to work more than nine hours during one day or more than fifty-four hours during any one week.

For the purposes of this opinion it will be assumed, and we feel that it is a fact, that the female employees in question are employees which are engaged in interstate commerce.

This question relative to female employees has arisen in several states and it has been ruled on by several jurisdictions. It seems from reading the Railway Labor Act of May 20, 1926, as amended by 45 U. S. C. A., Sections 151 to 163, that Congress has acted in the field of regulation of hours, conditions of labor and the wages of the employees of interstate carriers by giving the authority to interstate carriers and labor unions to enter into agreements relative to hours, wages and conditions of labor, subject to control by the National Mediation Board and the National Railroad Adjustment Board. In entering into such field Congress manifested its intention to exercise its constitutional authority to regulate the conditions of labor, wages and hours of such interstate carriers.

In the case of *Erie Railroad Co. v. The People of the State of New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Supreme Court 756, the Supreme Court of the United States said:

"The relative supremacy of the state and national power of interstate commerce need not be commented on. Where

there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist."

Again in Long Island Railroad Co. v. the Department of Labor of the State of New York, 177 N. E. 17, 256 N. Y. 498, it was held that regulation by Congressional action of hours of labor of employees engaged both in interstate and intrastate commerce, prevents the state from exercising power of regulation in the same field.

Again it was held in Ex parte Truelock, 140 S. W. (2d) 167 (Texas Criminal Appeal), that the power of Congress to regulate interstate commerce is supreme and when any state statute is in conflict with enactments of Congress or whenever it seriously hampers the movement of interstate commerce, even over state public highways, such a state statute must yield and be superseded by the Congressional enactments.

We further find that in Award No. 707, Docket No. TE-629, the National Railroad Adjustment Board, Third Division, the board in its ruling made the following statements:

"The question, therefore, which must be decided by this Division in the disposition of this controversy is whether Congress in the enactment of the Railway Labor Act of 1926 as amended in 1934 has manifested its purpose to exercise to the exclusion of state control its constitutional authority over wages, hours, and basic working conditions of railway employees brought under the jurisdiction of the federal government by the Railway Labor Act. It is the conclusion of the Division that Congress has so manifested its purpose, and that the collective agreement involved in this dispute takes precedence over an inconsistent state law."

"Certain features of the Railway Labor Act clearly indicate that Congress in its enactment has manifested its purpose to exercise its constitutional authority to regulate the wages, hours, and basic working conditions of all employees of interstate carriers, and that it has established a unified scheme to that end."

We will not quote the Railway Labor Act as cited in Title 45 U. S. C. A., Section 151, at page 257, due to the fact that such Railway Labor Act is very lengthy. However, after reading such act we have come to the same conclusion that the National Railroad Adjustment Board did, in that the Congress of the United States clearly manifests its intention to exercise its constitutional authority to regulate the wages, hours and basic working conditions of all employees of interstate carriers. However, we wish to call attention specifically to Section 151a of said Act, which reads as follows (p. 267):

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

And also we wish to call attention to paragraph one of Section 152 of said Act, which provides as follows:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

In Missouri there is a case somewhat similar in principle to the case involved in our instant request, said case being State ex rel. O'Rear v. Babash Railroad Co., 141 S. W. 646, 238 Mo. 21, in which it was held that the Act of March 25, 1905, regulating the hours of service of trainmen, not being restricted to intrastate commerce and therefore embracing interstate commerce, was nullified by an Act of Congress of March 4, 1907, covering the same subjects or classes of legislation, though limited to interstate commerce.

Conclusion.

Under the provisions of the Railway Labor Act we feel that Congress has clearly manifested its intention to exercise its constitutional authority over the wages, hours and working conditions of all employees involved in interstate commerce. In the decisions which we have cited, the statute of a state, where it contradicts an Act of Congress, is held to be a nullity, and we feel that Section 10171, supra, relative to the employment of female employees and their hours of employment, clearly violates the provisions and intention of the Railway Labor Act of the United States and in

Mr. Orville S. Traylor

-6-

March 16, 1943

view of that fact we feel that such statute has been superseded by the Railway Labor Act and its regulations.

Respectfully submitted

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

Section 10176, or Section 14810, R.S.Mo. 1939,
LABOR DEPARTMENT: Pertaining to payment of employees, does
STREET RAILROADS: not apply to street railroads.

March 19, 1943

Mr. Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of March 4, 1943, in which you enclose a copy of a contract executed by an employee of the Kansas City Public Service Company and said company, dated November 25th, 1942. We set forth your letter, in which you request the opinion of this department, as follows:

"You will find enclosed a copy of the contract made by the Kansas City Public Service Company with Mr. Howard E. Hutchins.

"We would like to have your opinion on the following question:

"Can this contract legally provide that the pay a man received while in training may be deducted from the wages of the man received as a regular employee, if he resigned shortly after the completion of his training period?

"In this particular case, the man, Mr. Hutchins, quit after being with this Company for about forty days, including both his training and regular employment.

"I would like to call your attention, in this regard, to Section 10176 and 14810, R. S. Missouri, 1939."

We herewith set forth Section 2 of said contract, for the reason that it is the portion of the contract which pertains to the question asked in your letter. Said Section 2 provides as follows:

"That he will undergo a student training period of from fifteen (15) to thirty (30) days, for which he shall be paid two dollars (\$2.00) per day, one-half of this amount to be paid upon completion of the training period, the balance of the first regular payday thereafter. Should the Employee fail to qualify for car or bus service or be discharged before qualifying, he shall not receive any pay for the time spent as a student, and if the Employee leaves the service of the Company or is discharged before the expiration of ninety (90) days after date of qualifying for work, he will refund the amount paid him for said training period, and hereby authorizes the Company to deduct same from any wages or moneys which may be due him."

You call our attention to Sections 10176 and 14810, R. S. Mo. 1939, as bearing on the question asked in your letter.

Section 10176, supra, is found in Article 3, Chapter 68, R. S. Mo. 1939, under the general title of "Department of Labor and Industrial Inspection" and provides in part as follows:

"All persons or corporations engaged in operating a railroad or railroad shops in this state, shall pay their employees once in every thirty days in lawful money of the United States, and at no pay day shall there be withheld more than ten days of the earnings of the employees. * * * * *

(Emphasis ours.)

It will be noted that this section refers only to all persons or corporations engaged in operating a railroad or railroad shops in this state, and provides certain penalties for the violation of said section.

Section 14810, supra, is found in Article 1, Chapter 111, under the general title of "Mines and Mining and State Bureau of Mines" and provides in part as follows:

"All persons or corporations engaged in or operating any mines, stone or granite quarries in this state shall pay their employees once in every fifteen days in lawful money of the United States, and at no pay day shall there be withheld any of the earnings due any such employee:
*****"

We have examined the records in the Corporation Department of the Secretary of State's office and find that the Kansas City Public Service Company was originally incorporated under Article 5, Chapter 90, R. S. Mo. 1919, relating to street railroads. However, it was amended to include Article 1, Chapter 32, R. S. Mo. 1929, the general corporation statutes, and Article 16, Chapter 32, R. S. Mo. 1929, relating to stock corporations and not Article 2, Chapter 33, pertaining to railroad companies.

It will be observed, therefore, that the two sections of the statutes referred to in your letter, namely, Sections 10176 and 14810, R. S. Mo. 1939, are not applicable to corporations incorporated under the street railroad article and chapter, which is now Article 4, Chapter 43, R. S. Mo. 1939.

CONCLUSION

It is, therefore, the opinion of this department that the statutes referred to in your letter do not apply to corpor-

Mr. Orville Traylor

-4-

3-19-43

ations organized as street railroads and we do not find any section of our statutes which is contravened by Section 2 of the contract submitted to us.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

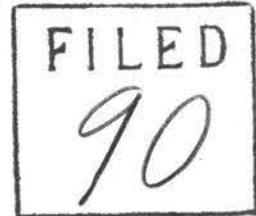
CRH:CP

EMPLOYMENT CONTRACT:
USURY:

Contract charging 60% for
obtaining a job is not usury.

March 31, 1943

3/30



Mr. Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter
of March 12, 1943, as follows:

"You will find enclosed a copy of Applica-
tion Form and Agreement used by the Index
Employment Company of Kansas City.

"Our Deputy Commissioner in Kansas City, Mr.
James A. Young, would like to know if the
charge of 60% of the first month's salary,
paid in installments, as provided for in
Section (a) of the Agreement, can be inter-
preted as usury."

Section (a) of the agreement which you have
attached to your letter:

"(a) An amount equal to Fifty (50%) Percent
of my first month's salary for a position
giving me employment if paid in cash, or Six-
ty (60%) Percent if paid in installments."

You ask whether or not the charging of sixty
(60%) percent of one month's salary for obtaining a per-

Mr. Orville S. Traylor

-2-

March 31, 1943

son employment constitutes usury under the laws of this State. In Williams v. American Exchange Bank, (Mo. Sup.) 280 S. W. (2d) 720, it is said (l. c. 723):

" * * * * * Usury is defined as 'the excess over the legal rate charged to a borrower for the use of money.' 3 Bouvier's Law Dict. p. 3380; McRackan v. Bank, 80 S. E. 184, 164 N. C. 24, 42 L. R. A. (N. S.) 1043, Ann. Cas. 1915D, 105. * * * * *

It is, thus, to be seen that usury is confined only to the lending of money at rates in excess of that provided by law. By no stretch of the imagination could the term usury be said to include a fee which one charges for personal services rendered.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LLB:FS

LABOR: (1) Municipally owned utility companies are subject to inspection by Labor Commissioner; (2) The prosecuting attorney of the county wherein the business establishment is located, shall enforce the provisions of Section 10180, R. S. 1939.

April 20, 1943.



Hon. Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri

Dear Mr. Traylor:

This will acknowledge receipt of your letter of April 12, 1943, requesting an opinion from this Department. Your letter, omitting caption and signature, is as follows:

"You will find enclosed an opinion by Arthur R. Wolfe, Assistant City Counselor of Kansas City, regarding the inspection by this Department of the municipally-owned utilities of Kansas City.

"On July 3rd, 1934, your office gave an opinion to Mary Edna Cruzen stating that we could make such inspections.

"In as much as other utilities have refused to pay this inspection fee, we would like to have an opinion from you as to what action we should take to collect such fees."

The purpose of the legislation in regard to labor is set out in Section 10153, R. S. Mo. 1939. This section provides as follows:

"The object of this department shall be to collect, assort, systematize and present in annual report to the governor, to be by him transmitted biennially to the general assembly,

statistical details and information relating to all departments of labor in the state, especially in its relations to the commercial, industrial, social, educational and sanitary conditions of the laboring classes and to the permanent prosperity of the productive industries of the state."

As can be noted from the above section, it was clearly the intention of the Legislature at the time this section was passed to enact this legislation for the protection of labor and for the maintenance of sanitary and healthful conditions for those people performing labor in different classes of employment.

The Legislature also enacted a law providing for the inspection of various types of businesses and manufacturing companies by the State Commissioner of Labor and Industrial Inspection, as provided in Section 10179, R. S. Mo. 1939. This section prescribes the following:

"The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of

April 20, 1943

each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments; Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

It will be noted from the above provision that although this section does not make specific provisions for the inspection of municipal utility companies, or of any utility company, it does provide that the Commissioner shall make two inspections each year of all "manufacturing, mechanical and mercantile establishments and workshops." It would seem that the question involved in this opinion is whether or not a municipal utility company comes under the terms of a "manufacturing, mechanical or mercantile establishment."

It has been held in several jurisdictions that a person engaged in the generation of electricity is engaged in a manufacturing or mechanical business. See State ex rel. Winterfield v. Hardin County Rural Electric Co-op., 285 N. W. 219, 225, 226 Iowa 896; In re Charles Town Light and Power Co., 183 Fed. 160, 1. c. 163; and McMillan v. Noyes, 72 A. 759, 762, 75 N. H. 258. Also see Angola Railway and Power Co., v. Butz, 98 N. E. 818, 1. c. 820 (Ind.); Lucas v. Ashland Light, Mill & Power Co., 138 N. W. 761, 763, 92 Neb. 550; Lamborn v. Bell, 32 P. 989, 1. c. 991, 18 Colo. 346, 20 L. R. A. 241.

As can be seen from a study of the above decisions a company organized for the purpose of generating and selling

April 20, 1943

electrical power, is, by the weight of authority, a manufacturing establishment or concern and would come under the terms of Section 10179, supra. There seems to be no question that persons engaged in the manufacture or handling of electrical current are subject to reasonable regulations and restrictions by proper authority in accordance with the statutes and municipal ordinances enacted in the proper exercise of police power. See 20 C. J., page 320, Sec. 23.

As stated above, Section 10179, R. S. Mo. 1939, was passed for the protection of the employees of different types of businesses, and the inspection fees as provided in Section 10180, R. S. Mo. 1939, is not a tax on the property of such business establishments but is merely an inspection fee. See *State v. Vickers*, 186 Mo. 103, 84 S. W. 908.

In the opinion of the Assistant City Counselor, which was attached to your request, there is a line drawn between utilities owned by private corporations and those owned by municipal corporations. We can see no merit in the contention that municipal utilities are not subject to the provisions of the sections of the statute cited above, merely because they are not specifically mentioned. We do not think it was the intention of the Legislature in enacting this law to include utilities operated by private interests and exclude those operated by municipalities, since in so doing the employees of the municipally owned utilities would not be afforded the same protection with regard to health and working conditions as those employed by a private enterprise. This certainly could not be the intention of the Legislature, as stated above.

Therefore, it is the opinion of this Department that the provisions of Section 10179, supra, relative to the inspection of labor conditions, apply to utility plants owned by a municipality.

Your request also contains a question as to how the inspection fees provided for by Sections 10179 and 10180, R. S. Mo. 1939, can be collected.

Section 10180 provides for the fees for inspection and also provides for the manner in which such regulations relative to the inspection of certain businesses can be enforced.

April 20, 1943

In view of the fact that this is a rather lengthy article, we will only cite that portion of such section as is applicable to the question herein involved. Such portion of Section 10180 reads as follows:

"* * * Any person, firm or corporation, agent or manager, superintendent or foreman of any firm or corporation, whether acting for himself or for such firm or corporation, or by himself or through subagents or foreman, superintendent or manager, who shall refuse or attempt to prevent the admission of any inspector authorized by this article, upon or within the premises or building of any establishments or place which he is required by law to inspect, at any reasonable business hour, or during working hours of the persons employed therein or thereat, or shall in any manner interfere with the performance of the official duties of such inspector, or shall neglect or refuse to pay the inspection fee upon the completion of such inspection, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense: * * *"

As can be seen from the above provision, if any person, firm or corporation, agent or manager, superintendent or foreman of any firm or corporation shall refuse to permit their particular establishment to be inspected or shall in any way interfere with the inspection thereof, or shall neglect or refuse to pay the inspection fee upon the completion of such inspection, such persons shall be guilty of a misdemeanor and punishable by a fine in the amount set out in such statute.

Consequently, if there is a refusal to permit the inspection of any establishment set out in Article 4 of Chapter 68, R. S. Mo. 1939, or if any such establishment, or manager thereof, shall refuse to pay the inspection fee, complaint should be made to the prosecuting attorney of the county in which such

April 20, 1943

business is located and whose duty it is to enforce the provisions of this article.

Conclusion

Therefore, it is the opinion of this Department that a municipally owned utility company is subject to inspection by the State Commissioner of Labor and Industrial Inspection as provided by Section 10179, R. S. Mo. 1939. It is further the opinion of this Department that where there is a refusal of permission to inspect any business establishment set out in such section, or a failure or neglect to pay the inspection fee as provided by Section 10180, R. S. Mo. 1939, it then becomes the duty of the prosecuting attorney of the county wherein such business establishment is located to proceed in court to enforce the provisions of Article 4, Chapter 68, R. S. Mo. 1939.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

CHILDREN:) Proviso in section takes precedence over the
) whole section.
LABOR:)

June 11, 1943

Mr. Orville S. Traylor
Commissioner of Labor
Labor and Industrial Inspection
Department
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of June 2, 1943, in which you request an opinion from this department, as follows:

"We have been asked by a great many people for an explanation of Sections 9620 and 9621, R. S. Missouri, 1939.

"Section 9620 contains the following provision:

"Provided, that during the hours public schools are not in session, children between the ages of twelve and sixteen years may be gainfully employed except in industries which employ more than six persons."

"Section 9621 contains the following:

"Provided, however, that the provisions of this article shall not apply to any child engaged in the sale of newspapers, magazines and periodicals, nor to agricultural labor and domestic service, nor to any work, labor or service performed for or under the personal supervision or control of the parent or guardian of such child, nor when school is not in session to industries which employ less than six persons."

"We would especially like to know if either or both of these sections take precedence over the other sections of the article. It seems to this Department that the two provisions quoted above are contrary to the other sections of this article.

"We would also like to have your definition of the term 'industries' as it is used in both of these sections.

"Due to the fact that the public schools have been dismissed for the summer, more children than usual are asking for work permits. For this reason we would appreciate a prompt reply."

Section 9620, R. S. No. 1939, reads as follows:

"It shall be unlawful for any child in this state under the age of 16 years to be employed, permitted or suffered to work at any gainful occupation unless such employment is authorized as in this article, or otherwise by law provided: Provided, that during the hours public schools are not in session, children between the ages of twelve and sixteen years may be gainfully employed except in industries which employ more than six persons."

The proviso under Section 9620, as set out in your request, refers to children between the ages of twelve and sixteen, who may be employed in industries that do not employ more than six persons. In other words, the proviso is an exception to the main general section and to other sections in the article, and the section in which it is included. Of course, all of the conditions included in the proviso must appear.

A proviso must be construed with reference to the immediately preceding parts of the clause or section to which it is attached. State ex rel. Crow v. The City of St. Louis, 73 S. W. 623, 174 Mo. 125, 61 L.R.A. 593. The preceding clause in Section 9620 prohibits the employment of any child in this state under the age of sixteen, unless otherwise authorized in Article 3, Chapter 56, R. S. Mo. 1939. The proviso then excepts children between the ages of twelve and sixteen who meet the requirements of the proviso to Section 9620.

In stating the rule as to a proviso becoming an exception to the section in which it is included, 50 C. J. page 831, states:

"In a statute 'provided' may mean 'on' or 'upon condition.' It is said to be a rule, sustained substantially by all the authorities, that the usual office of the word 'provided' in a statute is to create a condition or to restrain the enacting clause, to except something which would otherwise be in it, or in some manner modify it. * * * *"

Also, in the case of State v. Murphy, 148 S. W. (2d) 527, 1. c. 532, Par. 13, the Supreme Court of this State, said:

"Ordinarily the word 'provided' introduces a condition or exception and is often synonymous with 'if,' but sometimes, even in statutes, it has only the meaning of the conjunction 'and.' 50 C. J. pages 830, 831; Doneghy v. Robinson, Mo. Sup. 210 S. W. 655, loc. cit. 659; State ex rel. v. Mooneyham, 212 Mo. App. 573, 253 S. W. 1098."

The courts, in construing a proviso, must consider it as it reads and according to the actual words as appear

therein. *Smith v. Pettis County*, 136 S. W. (2d) 282. In reading the proviso to Section 9620 it can readily be seen that the proviso is an exception to the general law as set out in the article. In the case of *State ex rel. Buchanan Co. v. Imel*, 219 S. W. 634, 1. c. 636, the court said:

"While the effect of the proviso, under the general rule (*Brown v. Patterson*, 224 Mo. 639, 124 S. W. 1), was to restrict the preceding portion of the section, it became upon its adoption as much a substantive and operative portion of the original section as if incorporated therein when the latter was first enacted. * * * * *

The main part of Sections 9620 and 9621, as hereinafter set out, are general words stating the law, but the proviso describes a special class which should not be considered under the general law, that is, Sections 9620 and 9621, or other sections in Article 3, Chapter 56, R. S. Mo. 1939. In the case of *McClaren v. G. S. Robins & Co.*, 162 S. W. (2d) 856, 1. c. 858, the court said:

"* * * The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified. *Keane v. Strodman*, 323 Mo. 161, 18 S. W. 2d 896; *Mangelsdorf v. Pennsylvania Fire Insurance Company*, 224 Mo. App. 265, 26 S. W. 2d 818; *Puritan Pharmaceutical Company v. Pennsylvania Railroad Company*, 230 Mo. App. 848, 77 S. W. 2d 508."

Section 9621, R. S. Mo. 1939, reads as follows:

"No child under the age of sixteen years shall be employed, permitted or suffered to work at any gainful occupation for more than eight hours in any day, nor for more than forty-eight hours or six days in any one week, nor before the hour of seven o'clock in the forenoon nor after the hour of seven o'clock in the afternoon of any one day: Provided, however, that the provisions of this article shall not apply to any child engaged in the sale of newspapers, magazines and periodicals, nor to agricultural labor and domestic service nor to any work, labor or service performed for or under the personal supervision or control of the parent or guardian of such child, nor when school is not in session to industries which employ less than six persons."

This section merely sets out the time of employment, but the Legislature, again showing its intention and purpose, sets out a proviso, which, under the authorities set out under Section 9620, is an exception to the general law. The proviso also differs in that the industries coming within the proviso must employ only five or less employees and does not limit the age of the child in any manner, as set out in the proviso under Section 9620.

Two statutes relating to the same subject must be read together, and provisions of one having special application to a particular subject will be deemed a qualification of, or "exception" to other statute general in its terms. *Eagleton v. Murphy*, 156 S. W. (2d) 683, 348 Mo. 949, 138 A.L.R. 749.

Of course, there are many exceptions in the Laws of Missouri which are special in their nature and which should be followed even in cases which may come under the provisos as set out under Sections 9620 and 9621. We are herein setting out some of the sections which are special statutes and should govern in preference to the provisos above set out. Most of the sections are as to hazardous work where children cannot be employed. We refer you to factories

that employ explosives as set out under Sections 4665 and 4668; also to the punishment for employing children under hazardous occupations as set out in Sections 4665 and 4670. Also, the main exceptions and prohibited employment of children under the age of sixteen years, as set out under Section 9622. These being special statutes should be followed in preference to the general law. Where statutes dealing with the common subject matter are necessarily inconsistent the statute which deals with the subject matter in a minute and particular way will prevail over one of a more general nature. *State v. Richman*, 148 S. W. (2d) 796, 347 Mo. 595.

Your further question in your request is that you would like to have our definition of the term "industries" as it is used in both of the provisos of both sections. The Supreme Court of this State in the case of *State ex rel. Kansas City Power & Light Co. v. Smith*, 111 S. W. (2d) 513, 1. c. 515, defined "industrial establishments" wherein they said:

"The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business 'which employs much labor and capital and is a distinct branch of trade; as, the sugar industry.' Webster's New International Dictionary. Thus, we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial.'"

Also, in the State of Washington the Supreme Court in the case of *Dessen v. Department of Labor and Industries of Washington*, 66 Pac. (2d) 867, 190 Washington 69, defined "industry" as any department or branch of art, occupation or business, especially one which employs much labor and capital and is a distinct branch of trade. Most of the other states consider that "industry" is any department

or branch of art, occupation or business and is especially one which employs much labor and capital and is a distinct branch of trade. In the case of State ex rel. Kansas City Power & Light Co. v. Smith, 111 S. W. (2d) 513, supra, the Supreme Court of this State distinguished commercial and industrial purposes, in that commercial was the sale of certain things and industrial was the production and manufacture of certain things. We, of course, must accept the definition of "industrial" which is synonymous to "industry" as the proper definition as set out by the Supreme Court.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the provisos contained in Sections 9620 and 9621, take precedence over the other sections of Article 3, Chapter 56, R. S. Mo. 1939, except such sections that are special sections prohibiting employment in certain occupations that are considered hazardous, and employment as prohibited and set out under Section 9622, R. S. Mo. 1939.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WJB:CP

HOURS OF LABOR:
FEMALE EMPLOYEES:

Female employe may not be employed more than nine hours in any one day or more than fifty-four hours during any one week.

June 25, 1943



Mr. Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri

Dear Mr. Traylor:

This office is in receipt of your request for an opinion, the details of which are set out in a letter from the Great Atlantic and Pacific Tea Company. This letter reads as follows:

"We have recently added a woman to our staff of Field Auditors and we should like to have your clarification of her work hour schedule.

"At present she is being paid for a 48 hour week, consisting of time spent both in traveling to and from stores in St. Louis and in time spent actually working in the stores. Her work includes inventorying merchandise in the stores, counting ration points and checking managers' cash balances and of observing the practices of company policies. Time spent in a store runs from 2½ hours in a small service store to 5 hours in a large super market.

"Due to several of our male field auditors expecting to be called for military duty and the decrease in

June 25, 1943

available manpower for replacements, we may find it necessary to send this woman field auditor to our stores located in a radius of approximately 200 miles of St. Louis. The time required in traveling to and from stores may run into several hours a day. If time consumed in travel were to be considered as part of her nine hour work day we would obtain considerably less than nine hours work from her on some days.

"We intend to continue to pay her for total number of hours per week spent in traveling to and from stores plus time spent in the stores, but we would like to have approval from you to include only the hours actually spent working in the stores in her nine hour work day and exclude time spent in travel. The local office of your department has verbally approved this, but we would appreciate a letter from you for our files and they recommended our writing you for it."

The statute quoted in your letter is Section 10171 R. S. Mo., 1939. The full text reads as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of

amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided further, that nothing in this section shall be construed and understood to apply to telephone companies; and be it further provided, that the provisions of this section shall not apply to towns or cities having a population of 3,000 inhabitants or less."

The penalty section may be found at Section 10173 R. S. Mo., 1939, which we do not quote because of its length and for the further reason that thusfar no violation of the statute is involved. This statute is clear, unambiguous and needs no interpretation, yet for the purposes of our discussion we refer you to other authorities and decisions in support of the conclusion to which we arrive.

The statutes involving hours of service restricting the laws of labor for female employees have been enacted,

the object of which is to secure the public comfort, welfare, health and safety of this class of employes. Your attention is directed to that paragraph, 39 C. J. 58, 59, paragraph 37:

"In holding valid laws restricting the hours of labor of women, as a class, the consideration of health is of especial importance, and a law as applied to them may be valid when similar statutes would be invalid if applied to males. The guaranty against discrimination in a state constitution providing that no person shall, on account of sex, be disqualified from entering or pursuing any lawful business, vocation, or profession, is subject to reasonable regulations under the police power, and does not prevent reasonable restrictions of females in their working hours under the police power for the protection and preservation of the public health."

Devoting our attention now to the question as to what constitutes hours of work we find in 19 Words and Phrases, page 679, the following:

"Within Workmen's Compensation Act June 2, 1915, art. 3, sec. 301, P. L. 736, 77 P. S. pars. 411, 436, the injury must occur within the 'hours of employment' but the 'hours of employment' are not confined to the period for which wages are paid, but may include time, before the beginning of regular work, after it was ended, or during intervening

hours. *Malky v. Kiskiminetas Valley Coal Co.*, 123 A. 505, 506, 278 Pa. 552, 31 A. L. R. 1082.

"The 'hours of service' during which an injury must occur in order to entitle the employee to compensation, in view of Gen. St. 1923, sec. 4326, subd. (j), are not limited to the hours for which the injured employee is paid or actually rendering service, but include the period of reasonably prompt ingress and egress while still upon the immediate premises, and extend to the time when an employee, having put aside his own independent purposes, has entered the premises of his employer appurtenant to the place where his service is rendered for the purpose of beginning such service immediately, or within a reasonable time, and is approaching the place thereof by an avenue customarily used by employees. *Simonson v. Knight*, 219 N. W. 869, 870, 174 Minn. 491."

Looking to other jurisdictions on the same subjects we find in *Haddad v. State*, 86 Tex. Crim. App. 592, 218 S. W. 506. In this case involving the question as to whether the time a waitress is eating her meals in a cafe in which she was employed should be deducted from her hours of employment the court said:

"It is contended that the time she used in eating her meals, or practically one hour a day, should be discounted from the 9 hours if she

only worked one day, or the one hour per day should be discounted from the 54 hours; if this is correct, then her employer was entitled to a discount as against the 54 hours of 7 hours; that he should not be charged under the allegation or theory of 54 hours with the time that she was visiting about the town and the one or two evenings when she failed to present herself in her employment and was absent. We are of opinion that the time she occupied at meals should not be discounted from her terms of employment; that she was in the cafe and was ready to discharge her duties, and sometimes was called from her meals while eating to wait upon customers. This we think shows that she was in the employ of her employer, and he was not entitled to credit as against the 54 hours for such time. But we are further of opinion that her absence on other occasions above mentioned should be deducted from the 54 hours. She was not working under employment, was absent from it, and was not subject to the calls of duty of her employer, but she was in position where she could not work nor be required to work. This was voluntary on her part. She was not rendering any service, or in position to do so. * * * * *

Mr. Orville S. Traylor

-7-

June 25, 1943

CONCLUSION

From the above and foregoing, it is the opinion of this department that the State, under the Constitution, has the right to regulate hours of labor of female employees, that in the regulations requiring an employer to work his female employees no longer than such hours per day, the "hours of labor" must include that time the employe is actually under the direction and employment of the master, that the auditor in the course of her employment may not deduct from her hours that time spent in being transported from the various company's stores.

Respectfully submitted,

L. I. MORRIS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

LIM:FS

June 30, 1943

7/9



Honorable Orville S. Traylor
Commissioner of Labor
Jefferson City, Missouri

Dear Sir:

Your request for an opinion, dated June 16, 1943, has been referred to the writer for answer. Your request concerns the construction and application of a statute, Section 10175, Missouri, R. S., 1939, which provides as follows:

"The employees of the operators of all manufacturing, including plate-glass manufacturing, operated within this state shall be regularly paid in full of all wages due them at least once in every fifteen days, in lawful money, and at no pay day shall there be withheld from the earnings of any employee any sum to exceed the amount due him for his labor for five days next preceding any such pay day. Any such operator who fails and refuses to pay his employees, their agents, assigns or anyone duly authorized to collect such wages, as in this section provided, shall become immediately liable to any such employee, his agents or assigns for an amount double the sum due such employee at the time of such failure to pay the wages due, to be recovered by civil action in any court of competent jurisdiction within this state, and no employee, within the meaning of this section, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions hereof."

The writer assumes that by your request you desire an analysis of this section and an example or illustration of how it would apply to the facts you state in your request.

The first sentence of said section reads:

"The employees of the operators of all manufacturing, including plate-glass manufacturing, operated within this state shall be regularly paid in full of all wages due them at least once in every fifteen days, in lawful money, and at no pay day shall there be withheld from the earnings of any employee any sum to exceed the amount due him for his labor for five days next preceding any such pay day."

The first clause of this sentence merely means that once every fifteen days the employer shall pay the employee all the money due to said employee for work performed, prior to the day of payment, but even then five days earnings may be withheld by the employer--manufacturer. The last clause of the above quoted sentence seems to have been the cause of difficulty. A probable reason of that clause is that in the past manufacturers had withheld certain amounts to cover breakage or penalties of one nature or another. Apparently, the withholdings of salaries by the manufacturer--employer were of such an amount as to burden the employee, so the Legislature deemed it advisable to limit such withholdings, possibly as an exercise of its police power, and consonant with the spirit of the entire section. The last clause in no way establishes the time limit upon what day the salary is to be paid. It merely limits the amount of wages due the employee that the manufacturer--employer may withhold, at any pay day.

You state in your request:

"Several large companies take seven or eight days after the close of their work week to figure up the amount due and to draw up the checks. They have advised us that they pay once a week, and if it is necessary to pay within the five day period, considerable extra help would be required."

Applying Section 10175 to the situation quoted from your letter above, it is the opinion of this office that the Section works as follows. The companies of which you speak pay every week, but take seven or eight days to draw up the checks. Let us apply the Section and the facts you state to the past month of June for illustration. Let us assume that the company pays on Saturday. "any other day would be the same", that would be the dates of the 5th, 12th, 19th, and 26th. If on the 12th they pay for the week's work completed prior to the 12th, in other words,

June 30, 1943

for work done from the 6th of June to the 12th of June, but take 8 days to draw up the checks the company would actually be paying on the 20th of June, for the work done from the 6th to the 12th of June. The time elapsed from June 6th to June 20th is fourteen days, clearly within the statutory limit of fifteen days. The five day period of which you speak is merely the sum that may be withheld by the employer--manufacturer from the earnings of the employee on the 20th of June. For example, if the employee earns two dollars a day, on June the 20th, when payment of wages is made, not more than ten dollars (\$10.00) may be withheld from his earnings of fourteen dollars (\$14.00), assuming the employee works a seven day week. In other words, the five day period of which the statute speaks is not an attempt to set the date of payment but is a limitation on the amount the employer--manufacturer may withhold on any pay day.

In your letter you write:

"The employers in one company now pay on Friday of each week for work performed subsequently to the preceding Sunday. They wish to change their pay day to the following Monday, as their experience in other states shows that paying on the following Monday eliminates up to 75% of the absenteeism. This, however, would mean that they would be withholding six or seven days' pay, as their work week begins on Monday. The federal regulations require that they pay double time for the seventh consecutive day which, in their particular case is Sunday, and their experience shows that Sunday is the hardest day for them to have a full working force. The changing of the beginning of their work week to Wednesday in order to comply with Section 10175 on the "fifth day", therefore, would not help solve their problem of absenteeism on Sunday."

There the company pays on Friday, "for work performed subsequently to the preceding Sunday." In other words, they pay on June 25th for work done between the 21st and 25th. That is within the fifteen day limit for payment provided by Section 10175. If said company wishes to pay on the following Monday, by our example June 28th, such payment would still be within the fifteen day period set up by statute.

June 30, 1943

CONCLUSION

(1) Once every fifteen days the company must pay the employee all wages due him whether earned during the fifteen days prior to the date of payment or before. (2) The company at the date of payment may withhold, at any pay day, five days wages, or less. (3) The five day period of which the statute speaks is merely a limitation on the amount of wages that may be withheld on any pay day, and in no way should be construed as establishing a time limit for a payment of wages.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WCB:DC

LABOR: Under Laws 1913, p.400 females may not be employed
WOMEN: in state for more than 9 hours a day or 54 hours a week.

October 19, 1943.

10-22
Mr. Orville S. Traylor,
Commissioner of Labor,
Jefferson City, Missouri.



Dear Sir:

In your letter of July 8, 1943, you have asked our opinion as to the present effectiveness of Section 10171, R. S. Mo. 1939, in view of the decision of the Supreme Court of Missouri in State v. Taylor et al. 173 S.W. (2d) 902.

Section 10171, R. S. Mo. 1939, is as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, hereinabove described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided further, that nothing in this section shall be construed and understood to apply to telephone companies: and be

it further provided, that the provisions of this section shall not apply to towns or cities having a population of 3,000 inhabitants or less.

This statute was changed to its present form, by way of an amendment appearing in Laws 1919, page 447, which changed the underlined word "or" from "of" and which added the third proviso above underlined. The court in the Taylor case (l.c. 904) in discussing this amendment stated:

"* * * the title of the 1919 Act merely declared its purpose to amend Sec. 7815 in the 1913 Act (*italics ours*) 'by striking out certain words therein;' and the recital in the first or enacting clause of the 1919 Act also was limited to a statement that the word 'or' was being substituted for the word 'of' in the eighth line. Neither the title nor the enacting clause disclosed the third proviso was being added."

Section 28, Article 4 of the Constitution provides:

"No bill * * * shall contain more than one subject, which shall be clearly expressed in its title."

The title of the 1919 Act clearly does not comply with this provision and is therefore unconstitutional because it failed to show that the subject of the amendatory act was to exclude cities of 3000 or under from the scope of the act.

In the Taylor case the state failed to raise in the trial court the point that the 1919 amendatory Act was itself invalid due to the defective title and the court therefore ruled that Section 10171 was unconstitutional because the exclusion of cities under 3000 created an unreasonable discrimination between areas of the state. The court stated (l.c. 905):

"Taking the case as it was presented below, we think the trial court was right in holding Sec. 10171 as it now appears in the 1939 Revision is discriminatory and constitutionally void under both Sec. 30, Art. II and Sec. 53, subsec. 24, Art. IV."

Then the court went on to say (l.c. 905-6):

"* * * If the State had challenged below the constitutional validity of the enactment of the 1919 amendment, and the trial court had ruled adversely on the challenge, a very serious question would have been presented. Or if the State had contended there, as it suggests here, that the third proviso added by the 1919 amendment was substantively unconstitutional, in consequence of which only that amending proviso was void leaving the statute as it stood before, another serious question would have been presented. The authorities cited by the State and listed in marginal note 2, supra, sustain that view; and the statute shorn of the proviso would apply anywhere throughout the State, except as regards the exemptions in the first and second provisos, which are immaterial here.* *"

Thus clearly the court was not holding Section 10171 unconstitutional for all times, but only as presented in that case. If, in another case, where the validity of said section is attacked due to the discrimination caused by the proviso excluding cities of 3000 or less, the State raises in the trial court the point that the 1919 amendatory Act is invalid, then we are of the opinion that Section 10171, as it appears in Laws 1913, page 400, will stand the test of constitutionality.

The 1913 Act (Laws 1913, p.400) which we think is today the governing law, is as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishments, or factory, workshop, laundry, or bakery, or restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, herein above described, or by any person, firm or corporation engaged in any express or transportation of (or) public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided, that nothing in this section shall be construed or understood to apply to telegraph or telephone companies."

CONCLUSION

It therefore is our opinion that the Act appearing in Laws 1913, page 400, today prohibits the employment of women more than nine hours in one day or more than fifty-four hours in one week in all parts of the state.

Respectfully submitted,

APPROVED:

ROY McKittrick,
Attorney General.

LAWRENCE L. BRADLEY
Assistant Attorney General

LABOR: Section 7815, page 400, Laws of Missouri, 1913,
prevents female employees from working full time
under such Act at plant and then taking work out
to be done at home.

November 3, 1943

Mr. Orville S. Traylor
Commissioner
Labor and Industrial Inspection Department
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an
official opinion, under date of October 28th, which reads
as follows:

"Would it be a violation of Section
7815, R. S. Missouri, 1913, if females,
after working in the Billing Department
of a plant for nine hours a day, take
work home with them to be done for the
company at the regular hourly wage?

"Would it be a violation of this section
if these girls received no compensation
for this home work?"

Under date of October 19th, 1943, this department
rendered an opinion to you, holding that the Act of 1913 is
the controlling law rather than Section 10171, R. S. Mo. 1939.
Hereafter any reference to Section 10171 shall apply to Section
7815, Laws 1913.

One of the cardinal rules of statutory construction is
to ascertain the legislative intention, and, in so doing ref-
erence should be had to the policy adopted by the Legislature
in reference to the particular subject matter, object of statute
and mischief sought to be prevented or remedied.

In State ex rel. Lentine v. State Board of Health, et
al., 65 S. W. (2d) 943, l. c. 950, the court said:

"It may be considered trite to again observe that the primary and fundamental purpose in statutory construction is to ascertain and give effect to the legislative intent nevertheless such is always the end sought and the numerous rules for the interpretation or construction of statutes are merely aids in the quest. But such rules should not be so applied as to restrict or confine the operation of a statute within narrower limits or bounds than manifestly intended by the Legislature and whether the proper construction of a statute should be strict or liberal it certainly should be such as to effectuate the obvious purpose of its enactment and the evident legislative intent. Reference should be had to the policy adopted by the Legislature in reference to the subject-matter, the object of the statute, and the mischief it strikes at or seeks to prevent, as well as the remedy provided. * * * * *

Section 7815, page 400, Laws of Missouri, 1913, reads as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishments, or factory, workshop, laundry, or bakery or restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, herein above described, or by any person, firm or corporation engaged in any express or transportation of (or) public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week: Pro-

vided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year: Provided, that nothing in this section shall be construed or understood to apply to telegraph or telephone companies."

It is quite apparent that one of the principal reasons for the Legislature enacting the above law was to prevent any such employer from working any female employees for more than nine hours during any one day, or fifty-four hours during any one week; that to consistently work such employees more than such hours unquestionably would impair their general health and should be prohibited. Therefore, in construing this provision we must bear in mind the reason and purpose for such enactment.

The decisions are unanimous in defining what constitutes a day. A day is twenty-four hours intervening between midnight of one day and the following midnight.

In State v. Meagher, 101 S. W. 634, 1. c. 635, 124 Mo. App. 333, the court in defining a day said:

"* * * Our statute does not define the day, but we must take it to mean what the term ordinarily signifies (sec. 4160, R. S. 1899) that is, that it consists of twenty-four hours, commencing and terminating at midnight."

Section 7815, supra, reads in part:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishments, * * * * * or to do any stenographic or clerical work of any character in any of the

divers kinds of establishments and
places of industry, * * * * *

Section 10172, R. S. Mo. 1939, provides it shall be unlawful to knowingly permit the employment of a female in any of the places of industry or business mentioned in Section 10171, R. S. Mo. 1939, within three weeks before or after childbirth. Section 10172, supra, reads as follows:

"It shall be unlawful for any person, firm or corporation to knowingly employ a female or permit a female to be employed in any of the divers kinds of establishments, places of industry, or places of business specified in section 10171, within three weeks before or three weeks after childbirth. Any person, firm or corporation who shall violate this section shall be deemed guilty of a misdemeanor."

Furthermore, Section 10173, R. S. Mo. 1939, specifies the penalty for a violation of Section 10171, supra, in working any female employee more than the number of hours specified therein, and likewise refers to in any of the places mentioned in Section 10171, supra. Section 10173, supra, reads as follows:

"Any employer or overseer, superintendent, foreman, agent or any other employee who shall require or permit or suffer any female to work in any of the places mentioned in section 10171 of this article more than the number of hours therein specified, or any employer who permits or suffers any overseer, superintendent, foreman, agent or other employee to require or to permit or to suffer any female to work in any of the places mentioned in section 10171 of this article more than the number of hours therein specified shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than twenty-five dollars nor more than one hundred dollars."

In view of Sections 10172, and 10173, supra, making it a misdemeanor for a violation of Section 10171, supra, it might require a strict construction in favor of the person charged with the offense, and, in construing the words hereinabove underscored in Sections 10172, and 10173, supra, it is barely possible that the courts would hold that no violation of Section 10171, supra, would be committed under the facts contained in your request permitting the employee to take work home after having theretofore worked in the place of business the maximum hours under Section 10171, supra, since it only makes it a misdemeanor for working females longer than required in places mentioned in Section 10171, supra, and it does not specifically make it a violation for working more than the maximum hours while in the home of the employee.

The writer has searched the decisions in this State, and others, and is unable to find any decision exactly in point. It is a very close question and difficult to determine just how a court might rule under the facts. It may be advisable for some interested party to have the court pass upon this matter.

In view of what has been said, we must hold the restriction is against the employment in excess of the maximum hours as provided in Section 10171, supra, and not just against working at the plant in excess of such maximum hours. While Section 7815, supra, refers to work done in certain establishments, which ordinarily refers to certain enclosures, we think the Legislature fully had in mind that no single employer of the kind enumerated in Section 7815, supra, should work any female employee longer than nine hours during any day and fifty-four hours during any week, regardless of whether such employee performed all the work in the establishment, at another place, or even in her home. There is a long established maxim of law that one cannot do something indirectly which he is prohibited from doing directly. We think this is applicable in the instant case. In *Eisensmith, et al. v. Buhl Optical Co.*, 178 S. E. 695, 1. c. 697, it is stated:

"The act precludes all persons not properly registered from practicing optometry. A corporation is a person, and in the nature of things it cannot possess the qualifications to practice optometry. A person, individual or corporate, may not do by indirection what he or it is precluded from doing directly."

If Section 7815, supra, should be construed to restrict the employer only while working such female employees within the confines or premises of the plant, and at no other place, then the purpose of the act certainly is only partially carried out, for said employer may give such employees certain home work, as referred to in your request. In such event, said employees might be working a total of twelve, fifteen or more hours during the day; all of which is nothing more than a subterfuge of the law, and, in direct violation of Section 7815, supra.

CONCLUSION

Therefore, it is the opinion of this department that if the foregoing statutory provisions be given a strict construction, then they should be construed so as to prohibit such employees from working in excess of the maximum amount of hours during any day or week as provided in Section 7815, supra, while actually working in the place of business; but in such case, there should be no restriction against such employees taking additional work home, since under the strict construction Section 7815, supra, would be applicable to only work executed within the plant or industry. However, if such provisions be given a liberal construction, it places a restriction against the employment for more than the maximum hours permitted under Section 7815, supra, and in such case the employee is permitted under no circumstances to work in excess of such maximum hours as provided in Section 7815, supra. This would prevent an employee working nine hours at the office continuing to work at her home after office hours.

This department feels that in construing these provisions a liberal construction should be given. Therefore, we conclude that no female other than those specifically excepted in Section 7815, supra, employed in any of those industries named in Section 7815, supra, may work in excess of nine hours during any one day, or more than fifty-four hours during any one week, no matter where the work is executed, whether in the plant, office or at home.

Respectfully submitted,

APPROVED:

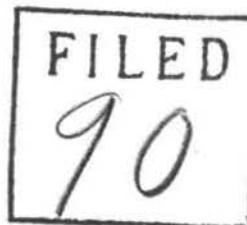
AUBREY R. HAMMETT, JR.
Assistant Attorney-General

ROY MCKITTRICK
Attorney-General

ARR:CP

EMPLOYMENT BUREAUS) The Department of Labor and Industrial
Inspection has no discretion to refuse
a license to applicant to operate an
employment agency. Its duty to license
is ministerial.

December 29, 1943



Honorable Orville S. Traylor
Commissioner
Labor and Industrial Inspection Department
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of
December 14, 1943, wherein you make the following in-
quiry:

"W. W. Dawson, who says he is Director of
Organization of The National Employment As-
sociation, Division of The Dawson System,
Incorporated, located at the above address,
has applied to this office for an employment
agency license under the provisions of Section
10161, R. S. Missouri, 1939.

"We have been informed The Dawson System, In-
corporated, is a Missouri corporation of which
W. W. Dawson is President. This corporation
is engaged in the business of offering instruc-
tion in selling under the heading 'Dawson System
of Sales Training'. As part of the training
offered by this company, students are required
to purchase the 'System' which consists of a
five volume set of paper bound books entitled
'The Dawson System of Sales Training', 5 x 7
in size, and about 65 pages of printed matter
per volume. The System of Sales Training written
by Dawson, copyrighted by him in 1940, is repre-
sented to be sold to members of the National Em-
ployment Association at a special price of \$25.00.
Persons are invited to become members of the
National Employment Association, paying an annual
\$3.00 membership fee with an additional \$2.00 re-
instatement fee should the member become delinquent.
You will note the National Employment Association
is operated as a division of the Dawson System,
Incorporated.

"We are enclosing a copy of the 'application for

Honorable Orville S. Traylor

December 29, 1943

membership' form used by these subjects, which constitutes the contract, when approved. Enclosed, also, is tear sheet from the Sunday, November 21, 1943, edition of the Kansas City Star, containing marked advertisement of The Dawson System, featuring their employment service, as well as other advertising material issued by the subject.

"We shall appreciate it greatly if you will give us your opinion on the following points:

"1. Does this plan of offering so-called free employment service to members of 'The National Employment Association' who are charged the membership fee above mentioned, constitute the operating or maintaining 'an employment office or agency for hire, or where a fee is charged' within the meaning of Section 10161, R. S. Missouri, 1939, so as to require a license and bond as provided by said section?

"2. Should your office determine that the operations of this business as herein described do require a license by this department, have we, the Department of Labor and Industrial Inspection, any discretion in refusing to issue a license should we determine the plan not to be in the public interest?

"3. Should it be determined that this office should issue a license, to whom should the license be issued? Should it be issued to 'The Dawson System, Incorporated', or to 'The National Employment Association'?"

Section 10161, R. S. Mo. 1939, page 246, provides in part as follows:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged, to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. Such license fee in cities of fifty thousand population and over shall be fifty dollars per annum, and in all cities containing less than fifty thousand population, a uniform fee of twenty-five dollars per

Honorable Orville S. Traylor

December 29, 1943

annum. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency. The license, together with a copy of sections 10161 to 10164, inclusive, shall be posted in a conspicuous place in each and every employment agency. The commissioner of labor and industrial inspection shall require with each application for a license a bond in the penal sum of five hundred dollars, with one or more sureties, to be approved by said commissioner and conditioned that the obligors will not violate any of the duties, terms, conditions, provisions or requirements of said sections. * * *

The statutes provide that the employment agency must maintain an "office or agency for hire" or charge a fee to applicants for employment or for help. The National Employment System maintains an office and charges a fee. The other prerequisites consist of filing their application for a license accompanied with license fee and a bond in the penal sum of \$500.

This type of business for which a license is sought bears only an incidental relation to public health, welfare or morals. Generally the only statutory prerequisites for such a license are the performance on the part of the applicants of certain definitely specified acts and it has been held that in such cases the duty to license is ministerial. On the other hand discretionary power in the issuance of licenses is actually given under the statutes in cases involving a license to practice medicine or dentistry because of the intimate connection between the vocation and the public health.

Neither the fact that the motives of the National Employment Association might be other than commercial gain or advantage nor suspicion of intended violation of the provisions of the statutes constitute a basis for refusal to issue the license. And this would be true even if the statutes prescribed discretionary powers. A greatly reduced rate is charged for this employment assistance, no doubt, because the applicant has purchased a set of books and enrolled in the Dawson System. But a fee is definitely charged for employment assistance and the amount of the charge is immaterial.

Penalties are provided in Section 10162 R. S. Mo. 1939 for violation of Section 10161, R. S. Mo. 1939 after the license is issued. Section 10165 R. S. Mo. 1939 describes the penalties for certain violations before the license is issued. Free employment advertised by the Dawson System is certainly erroneous

Honorable Orville S. Traylor

December 29, 1943

and probably deceptive, but the above mentioned statutes provide a penalty for violations of this nature.

CONCLUSION

It is our opinion that the National Employment Association is operating and maintaining "an employment office or agency for hire, or where a fee is charged" within the meaning of Section 10161 R.S. Mo. 1939, and requires a license and bond as therein provided.

Further, that the duty to issue the license is purely ministerial and must be issued by your department upon receipt of proper application, fee and bond and should be issued to the National Employment Association.

Respectfully submitted,

R. C. Lashly
Assistant Attorney-General

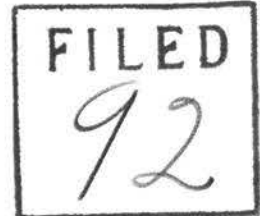
APPROVED:

ROY McKITTRICK
Attorney-General

RCL:ir

CRIMINAL LAW: Illinois licensee entitled to recognition
under reciprocity.

June 25, 1943



Honorable Jasper R. Vettori
Associate Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Mr. Vettori:

Under date of June 21, 1943, you wrote this office
requesting an opinion, as follows:

"This office desires an opinion to cover
the following facts and circumstances:

"A' has been a resident of this city
for the past year working in a defense
plant but maintains a home in the State
of Illinois where his family reside. He
lives in a rooming house here and visits
his family over the week-end. He has an
automobile which he has been operating
in this state ever since he has been here
and has an Illinois Registration Certificate,
an Illinois State Drivers' License and
Illinois State Plates. He was arrested
recently and charged with failure to have
Missouri State Vehicle and Drivers' License
and his counsel contends that under the
circumstances he does not need them.

"We will appreciate your opinion in the
premises."

The States of Missouri and Illinois both have statutes
requiring the registration and licensing of motor vehicles.
The Missouri statutes are found in Article 1, Chapter 45,
R. S. Mo. 1939. Section 8369 of this Article and Chapter
contains provisions requiring the registration of motor
vehicles.

The Illinois Motor Vehicle Registration Law is found
in Chapter 25 $\frac{1}{2}$, I. R. S. 1941, Bar Association Edition. Section 8

of this Chapter requires the registration of motor vehicles and is followed by several other sections classifying motor vehicles for registration purposes, and the Chapter further contains other sections which are not here pertinent.

The States of Missouri and Illinois each have a statute which exempts non-resident owners of motor vehicles from the operation of the laws requiring registration. The Missouri statute which exempts non-residents is Section 8375 of Article 1, Chapter 45 R. S. Mo. 1939:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The Illinois statute granting exemption from the operation of the Illinois Registration Statute to non-resident owners is Section 22, Chapter 95½, I. R. S. 1941 and is as follows:

"Except as is herein provided for foreign corporations, the provisions of sections 8, 9, 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, 10, 14, 17, and 27 of this Act shall not apply to any motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence; and the registration number showing the initial or abbreviation of the

name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in Section 14 of this Act: Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this State. If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of sections 8, 9, 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned."

Both states also have laws requiring a drivers' license or operators' license. The Missouri Drivers' License Law is found in Article 3, Chapter 45, R. S. Mo. 1939, and this Law contains provisions which exempt non-residents from the application of the Law. Attention is directed to Section 8444,

Article 3, Chapter 45, R. S. Mo. 1939, as follows:

"(a) It shall be unlawful for any person except those hereinafter expressly exempted to drive any motor vehicle upon any highway in this state unless such person has a valid license as an operator under the provisions of this article.

"(b) Any person holding a valid chauffeur's license or registered operator's license, as provided in Sections 8372 and 8373, need not procure an operator's license."

And to the following portion of 8445:

"The following persons are exempt from license hereunder: * * * *

"2. A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State only as an operator."

The Illinois statute requiring a driver's or operator's license is Section 34a of Chapter 95¹/₂ I. R. S. 1941, which section is as follows:

"On and after May 1, 1939 in the case of operators and on and after January 1, 1939; in case of chauffeurs, no person except those hereinafter expressly exempted, shall drive any motor vehicle upon a highway in this State, unless such person has a valid license as an operator or chauffeur under the provisions of this Act, an operator being hereby defined to mean any person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway. Any person holding a valid chauffeur's license hereunder need not procure an operator's license. Provided, however, that the following persons are exempt from the requirements of this Section:

"1. Any person while operating a motor vehicle in the service of the Army, Navy, or Marine Corps of the United States;

"2. Any person while driving or operating a road machine, farm tractor or implement of husbandry temporarily drawn, moved, or propelled on a highway;

"3. A non-resident of this State who is at least fifteen years of age and who has in his immediate possession a valid operator's license issued to him in his home State or Country, may operate a motor vehicle in this State only as an operator;

"4. A non-resident who is at least eighteen years of age and who has in his immediate possession a valid chauffeur's license issued to him in his State or Country may operate a motor vehicle in this State either as an operator or chauffeur except that any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this State;

"5. Any non-resident who is at least fifteen years of age, whose home State or Country does not require the licensing of operators, while operating a motor vehicle as an operator only, for a period of not more than 90 days in any calendar year, if the motor vehicle so operated is duly registered in the home State or Country of such non-resident.

"The provisions of this section granting exemptions to non-residents shall be operative only when under the laws of the State, foreign country or province, territory or federal district of such non-resident, like exemption and privileges are granted to licensed resident operators and chauffeurs of this State."

Attention is directed to the fact that this Illinois statute contains an exemption clause exempting non-residents which is quite similar to the Missouri exemption statute.

Under the statutes of the two states, it is apparent that registration of a motor vehicle in one of the states and regis-

Hon. Jasper R. Vettori

-6-

June 25, 1943

tration as a licensed operator in one of these two states may be given recognition in the other state.

CONCLUSION

If the State of Illinois gives full recognition to a Missouri Motor Vehicle License and Missouri Driver's License as it is authorized to do by statute, then it is the opinion of the writer that there should be no prosecution under the state of facts set out in your letter.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:PD

OFFICERS: Surveyor may appoint deputy in counties with population between 20,000 and 50,000 inhabitants and such deputy may act as the deputy county highway engineer.

August 17, 1943



Mr. B. F. Walther
County Highway Engineer
St. Francois County
Farmington, Missouri

Dear Mr. Walther:

The Attorney-General wishes to acknowledge receipt of your letter of August 14, 1943, in which you request an opinion of this department. Your letter, omitting caption and signature, is as follows:

"I would like to have an opinion from you upon the following question:

"I am the duly elected, qualified and acting County Highway Engineer of St. Francois County, a county that has more than 20,000 and less than 50,000 inhabitants. I am also the County Surveyor of said county, and by virtue of being elected to the office of county surveyor, am ex-officio county highway engineer in accordance with Section 8660 R. S. Mo. 1939.

"I expect to be called to military service sometime soon and would like to know whether I have the power to appoint a deputy county highway engineer and county surveyor to fill out my term of office. I assume that if I do have such power, that I can make such arrangements as I may deem proper with the person so appointed in so far as his compensation is concerned.

"I would appreciate an early opinion from you on this question."

August 17, 1943

As will be noted from your letter set out above, St. Francois County has a population of between 20,000 and 50,000 inhabitants. Section 8660, R. S. Mo. 1939, provides that in counties the size of St. Francois County the surveyor shall be the ex officio county highway engineer. This proviso which is the last proviso in Section 8660 aforesaid, prescribes the following:

"* * * Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum nor more than two thousand dollars per annum as shall be determined by the county court."

We also find in the provisions of Section 8660 of the Revised Statutes aforesaid, that the county court of several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer. This part of the section aforesaid provides as follows:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; * * *"

This part of the section aforesaid we feel does not apply in your case in view of the fact that in counties containing the number of inhabitants which your county does, the surveyor is automatically the county highway engineer and it then is not necessary that he be appointed as such by the county court.

August 17, 1943

We next wish to refer you to Section 13208, R. S. Mo. 1939, which pertains to the appointment of a deputy by the surveyor, and which provides as follows:

"Deputies may be appointed by any surveyor who, before they proceed to discharge their duties, shall take an oath well, truly and faithfully to discharge the duties of deputy surveyors."

This provision clearly gives you as surveyor of St. Francois County the right to appoint a deputy to perform the duties of your office in case you should be absent or unable to attend to such duties yourself.

It will be noted from the provision that there is no term of office specified in the section relating to deputies and neither is there any compensation fixed for the payment of such deputies. In case there is a provision for deputies by statute and there is no compensation fixed by such provision, such compensation must be paid by the officer employing such deputy and not from the public treasury. See 46 Corpus Juris 1062.

We further wish to call attention to the fact that where there is a statute providing for the appointment of a deputy, such deputy may perform all of the duties pertaining to the office of surveyor, where if there was no such provision as to deputies, such deputy could only perform the ministerial acts pertaining to such office.

Section 8660, cited above, also provides the following:

"* * * In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court; * * *"

August 17, 1943

In case the county court was called upon to appoint a county highway engineer, we feel that the above provision would apply, but in view of the fact that in a county the size of yours the surveyor becomes automatically the ex officio county highway engineer, we do not feel that this provision will apply in such cases.

CONCLUSION

Therefore, it is the opinion of this Department that you, as the Surveyor of St. Francois County, said county being a county having a population of between 20,000 and 50,000 inhabitants, are the ex officio county highway engineer and that under the statute set out above you further have the power to appoint a deputy surveyor. It is further the opinion of this department that pursuant to the last proviso of Section 8660, that in acting as ex officio county highway engineer, any deputy appointed by you will also act in your stead as far as the office of county highway engineer is concerned, and that it is not necessary that an assistant be appointed in conformity with Section 8660, R. S. Mo. 1939, by the county court of your county. It is further the opinion of this department that since there is no compensation fixed by law which a deputy shall receive, that any arrangements you may make with your deputy as to the payment of such compensation, cannot be questioned.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

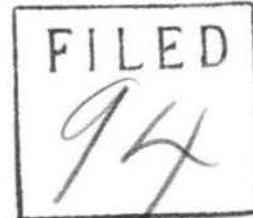
JSP:EG

Sheriffs
CONTEMPT:

Sheriffs may be guilty of contempt of court in failing to transport prisoners within a reasonable period after their sentence.

October 11, 1943

10-18



Honorable Ray E. Watson
Judge Division No. 1
Circuit Court of Jasper County
Webb City, Missouri

Dear Judge Watson:

The Attorney-General wishes to acknowledge receipt of your letter of September 17, 1943, in which you requested an opinion of this department. This opinion request, omitting caption and signature, is as follows:

"I desire to ask your opinion on the matter of retention of prisoners in the County Jail by the Sheriff after they have been sentenced to a term in the State Penitentiary or the Intermediate Reformatory. Section 4106, R. S. 1939, provides that the Sheriff "without delay" shall cause the convict to be transported to the penitentiary. We now have confined in the County Jail prisoners who were sentenced to the State Penitentiary and Intermediate Reformatory at the June, 1943 Term of Court. In one case motion for new trial was filed, and final judgment and application for parole were disposed of July 10th, 1943, so that more than sixty days has elapsed since these prisoners were released to the Sheriff for delivery to the proper institutions.

"In view of Section 4106 would a Circuit Judge have authority to cite the Sheriff for contempt of Court for failure to transport the prisoner to the penitentiary "without delay"?

"It is my understanding that you have previously ruled that the prisoner does not commence serving his sentence until he has been delivered to the State Penitentiary or Intermediate Reformatory as the case may be. Is this still the case?"

The duty of a sheriff with regard to the transportation of prisoners after they have been sentenced to the Penitentiary or Intermediate Reformatory, is set out in Section 4106, R. S. Mo. 1939. This section provides as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

It will be noted that the foregoing section of the statutes seems to be enacted with the intention, on the part of the Legislature, that as quickly as is possible or reasonable the prisoner shall be taken to the Penitentiary. We make this statement because of certain terms used in such section. The first of these terms is the word "forthwith." "Forthwith" has been defined in Ballantine's Law Dictionary as, "with all reasonable diligence and dispatch" (5 R. C. L. 411) and "within a reasonable time." (15 R. C. L. 611). We further find the following definitions: "'Forthwith' when used in reference to time, is generally construed to mean without delay," (Bottle Mining & Mill. Co. v. Kern, 99 P. 994, 9 Cal. App. 527; and, "'Forthwith' is convertible with 'at once' and 'prompt,' and in its ordinary acceptation means 'at the same point of time'; immediately; without delay; at one and the same time; simultaneously; directly." Lewis v. Hajar, 16 N. Y. S. 534, 536. Other definitions in Vol. 17, Words & Phrases, Permanent Edition.

In view of the above definitions and construction of the word, "forthwith," it would seem that when the statute, aforesaid, orders the clerk of the court wherein the sentence is pronounced, to "forthwith deliver" a certified copy of the sentence to the sheriff, that such order means it shall be done immediately and without delay.

We now wish to consider the meaning of the clause "without delay" as used in the aforesaid section of the Missouri Statutes. In Vol. 45 of Words and Phrases, Per. Ed., we find the following definitions of the clause:

"The requirement of the administration of justice 'without delay' means without unreasonable and unnecessary delay."

Ex Parte Ryan, 50 So. 385, 124 La. 356

and

"The words 'promptly and without delay' used to define a carrier's duty with reference to the transportation of goods, mean 'with reasonable promptness and without unreasonable delay.'" Burlingame v. Adams Exp. Co., 171 Fed. 902.

Considering Section 4106, R. S. Mo., set out above, in the light of the definitions cited, we feel that the intention of the Legislature in passing the aforesaid statute was that after a person had been sentenced by the court, the clerk of the court should immediately and without unreasonable delay issue a certified copy of the sentence to the sheriff, who in turn should immediately and without unreasonable delay transport the prisoner to the Penitentiary.

We have examined the certified copy of the sentence and judgment of the court, and notice that the court orders that the sheriff "of this county shall remove and safely convey the said defendant" etc. The order itself does not state that the sheriff shall execute it without delay or immediately. However, under the provisions of Section 4106, aforesaid, he is required to do so and if he does not, he then, in our opinion, becomes guilty of obstructing the administration of justice. So that the sheriff becomes guilty of contempt, if the obstruction of the administration of justice can be considered a contempt of court.

Before considering that question, we wish to state that it is the opinion of this department that any question of delay must be considered with a view as to whether such delay is reasonable or unreasonable. Of course, if a delay has been caused by some reasonable cause then an officer could be excused,

Oct. 11, 1943

so we are only concerned here with delay that is unreasonable. Along this line we wish to call your attention to a definition of "reasonable time," which we think is applicable here. This definition is found in Vol. 36 of Words & Phrases, Per. Ed., and is as follows:

"'Reasonable time' is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case." Bowen v. Detroit City Ry. Co., 20 N. W. 559, 54 Mich. 496.

As to whether the officer in this particular matter has held the prisoner for an unreasonable period of time, we are unable to say. This would be a question which would necessitate the person passing upon such matter to be in full possession of all of the facts in the case, which in this case we are not.

Returning to the question of contempt, we wish to cite you to a statement made in 17 C. J. S., page 10, which is as follows:

"Further, conduct which tends to obstruct the untrammelled and unprejudiced exercise of the judicial power is punishable irrespective of the place where committed."

Following the above authorities it appears to us, that if an officer obstructs the administration of justice that he may in such case be guilty of contempt of court. We further wish to cite 17 C. J. S., page 50, where the following statement is made:

"Other officers of court, likewise punishable for contempts committed by them, include * * * and sheriffs and marshals."

Conclusion.

Therefore, it is the opinion of this department that if a sheriff holds a prisoner, after conviction, in the jail

Oct. 11, 1943

for an unreasonable length of time, he can be adjudged guilty of contempt of court. It is further the opinion of this department that the court itself is the judge as to whether the time is reasonable or unreasonable, to be governed by the facts in each particular case. Further, it is the opinion of this department that the sheriff can be held accountable for neglect of duty as to a defendant sentenced to the Intermediate Reformatory, the same as if sentenced to the Penitentiary.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

TAXATION:
SALES TAX:

The fact that proceeds from a moving picture show are contributed to the Red Cross does not relieve the theatre from collecting the sales tax.

March 11, 1943



Mr. William H. Wessel
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you submit the question of whether or not the sales tax should be collected on tickets sold at a local theatre where the proceeds from such sale are turned over to the Red Cross.

If these transactions are exempt from the provisions of the sales tax act it is by virtue of the provisions of Section 11453, page 713, Laws of Missouri 1941. This section reads as follows:

"In addition to the exemptions under section 11409, there shall also be exempted from the provisions of this article all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

You will note that the exemptions apply to religious, charitable or eleemosynary institutions in the conduct of their regular religious, charitable, eleemosynary functions and activities.

The general rule on exemption from taxes is stated in State ex rel. v. Johnson, 214 Mo. 656. This rule has been applied and followed by the Missouri courts. It is that exemptions are in derogation of equal right and are not favored by the courts but

Mr. William H. Wessell

should be construed strictly and confined to the subject specified, including such as are necessarily within the contemplation of the legislation creating the exemption.

The local theatre could not be classed as a religious or charitable institution. The fact that it makes a donation to charity occasionally would not put it in such a classification. You will also note that this exemption section applies to such organizations when they are conducting regularly religious or charitable functions and activities. We do not think that the transaction to which you refer in your letter would bring the theatre within that classification.

CONCLUSION

It is, therefore, the opinion of this department that the fact that the local theatre turns over to the Red Cross the receipts from the sale of tickets taken in on any one particular night would not relieve the theatre from the duty of collecting sales tax on the tickets sold.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

FEEES OF CIRCUIT CDERKS: Clerk of Washington County entitled to \$400.00 per annum for services rendered as clerk of juvenile court or clerk of juvenile division of circuit court.

July 12, 1943



Mr. John W. White
Circuit Clerk and Ex-Officio Recorder
Washington County
Potosi, Missouri

Dear Sir:

This will acknowledge receipt of your request dated June 26th, 1943, for an official opinion from this office, which request is as follows:

"May I request an interpretation and ruling on Section 13437 R. S. Mo., 1939.

"Washington County, Missouri, under the Blue Book 1941-1942, has a population of 17,492 persons.

"My desire is for your ruling on Washington County."

Section 13437, R. S. Mo. 1939, is as follows:

"For their services as clerks of the juvenile courts, also known or designated as the juvenile division of the circuit court, the clerks of the circuit courts in all counties containing less than fifty thousand inhabitants shall receive and be paid an annual compensation as follows: In counties of less than seventy-five hundred inhabitants, \$100.00; in counties having a population of seventy-five hundred and less than ten thousand inhabitants, \$200.00; in counties having a population of ten thousand and less than fifteen thousand inhabitants \$300.00; in counties having a population of fifteen thousand and less than seventeen thousand five hundred inhabitants, \$400.00; and in counties having a population of seventeen thousand five hundred and less than fifty thousand inhabitants, \$500.00, payable out of the county treasury at the end of each month in equal monthly installments in the same manner as

July 12, 1943

salaries of such circuit clerks as provided under this article: Provided, however, the compensation provided for in this article for clerks of the juvenile courts shall be in addition to the salary allowed them by law for their services as clerks for the circuit courts and shall be paid to and received by such clerks in full compensation for all services now or hereafter required of or rendered by them as clerks of the juvenile courts or as clerks of the juvenile division of the circuit courts." (First underscoring ours).

Page 1032 of the Official Manual of the State of Missouri for the year 1941-1942, the population of Washington County is listed as 17,492.

CONCLUSION

It is therefore the opinion of this office that inasmuch as Washington County, by the last official census, has a population of more than fifteen thousand and less than seventeen thousand five hundred inhabitants, the salary of the circuit clerk and ex-officio recorder for his duties as clerk of the juvenile court or clerk of the juvenile division of the circuit court should be \$400.00 per annum. It is further the opinion of this office that this \$400.00 is in addition to any compensation received for services as clerk of the circuit court.

Respectfully submitted,

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GW:jn

CIRCUIT CLERKS: Not entitled to fee provided by Sec. 717, R. S. 1939;
said section repealed by House Bill 177 passed by
59th General Assembly.

September 13, 1943



Honorable John W. White
Clerk of the Circuit Court and
Ex-Officio Recorder
Washington County
Potosi, Missouri

Dear Mr. White:

Under date of September 8, 1943, you wrote this
office requesting an opinion as follows:

"There seems to be a misunderstanding here on the construction of Sec. 717 R. S. 1939, as my office is on a salary basis the County is of the opinion that it would be only a payment to me and from me back to the County in this case, so I would appreciate your opinion on this matter."

Section 717, R. S. Mo. 1939, referred to in your letter, is as follows:

"The clerk shall receive one dollar and fifty cents for his services at each term of the court, in complying with the provisions of the two preceding sections."

The "two preceding sections" referred to in Section 717 are Section 715, which directs the clerk of the circuit court to register the attendance and mileage of jurors, and Section 716, which directs the clerk to issue scrip to the jurors for their attendance and mileage. The fee of \$1.50 per term for these services was fixed by Section 717 and is all that the clerk was permitted to charge and receive for such services. Ford v. Ry. Co., 29 Mo. App. 616.

What is now Section 717, R. S. Mo. 1939, was first enacted in 1855 (R. S. 1855, page 911, Sec. 16) and was approved December 5, 1855. At that time the compensation of the clerk of the circuit court was upon a fee basis (R. S. 1855, pages 764, 765 and 766). Since that time the method of compensating the circuit clerks has been changed several times from a fee basis to salary, back to a fee basis, and then to a salary. Without setting out all of the changes and times when they occurred, attention is called to the last two changes. The 57th General Assembly, in 1933, repealed the act then in force under which the circuit clerks were paid a salary, and placed the clerks upon a fee basis with a fixed maximum. Laws of 1933, page 369. This bill was Committee Substitute for Senate Bill 74. In addition to fixing the maximum amount of fees which could be retained by the clerks of the circuit courts, it also fixed the fees of the county clerks, provided that the last United States Decennial Census should be used as the population of the county, provided for deputies and their pay, and required the clerks to charge, collect and account for all fees accruing to their office, except such fees as were chargeable to their respective counties.

The 59th General Assembly in 1937 again changed the method of paying the circuit clerks. Laws of 1937, page 444. This was House Bill 177, and the provisions of this act are now Sections 13408, 13434, 13435, 13436 and 13437, R. S. Mo. 1939. Section 13408, after fixing the compensation to be paid to the clerks of the circuit courts in the counties falling within the various population brackets, contains the following:

"* * * Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk

and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided: Provided further, that the clerks of the circuit courts shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venue from other counties: Provided further, that until the expiration of their present term of office, the persons holding the office of circuit clerk shall be paid the maximum amount as now provided by law, in the manner provided by this chapter."

Section 13435 provides that the salaries of the clerks and deputies shall be paid out of the county treasury.

Section 13436 provides as follows:

"It shall be the duty of the clerks of all circuit courts to charge and collect for the county, in all cases, every fee accruing to their offices under the provision of sections 13407, 13409 and 13410, or any other statute, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 13398. Such clerk shall, at the end of each month, file with the county clerk a report of all fees paid and accruing to

his office during such month, the date of accrual to be determined as the date of the final disposition of the case, stating the title of the case or on what account such fees were charged, together with the name of the persons who are liable for same, with the names of all sureties, where security of costs have been required, and which report shall also show what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection, and further stating that, after due diligence, he has been unable to collect the fees reported unpaid and which said report shall be verified by the affidavit of such clerks. And monthly, such clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such monthly reports and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

Section 13438, which was in effect at the time of the enactment of House Bill 177 by the 59th General Assembly, is as follows:

"It shall be the duty of such clerk, executive or ministerial officer, within fifteen days after such order has been made, to pay into the county treasury the amount of money so ordered to be paid, and take duplicate receipts therefor, one of which he shall file in the office of

the clerk of the county court, who shall immediately charge the treasurer with the amount thereof. If any clerk, executive or ministerial officer shall fail to pay the amount of money so ordered to be paid into the county treasury, and file the receipt therefor, within the said fifteen days, the county court shall immediately cause suit to be commenced on the official bond of such clerk for such amounts of money, together with interest, at the rate of twenty per cent per annum from the end of said fifteen days till paid."

As previously pointed out, when what is now Section 717 was first enacted the clerks of the circuit courts received their compensation in the form of fees collected from litigants and a few fees from the counties, like the one provided for in Section 717, and they are now paid a salary out of the county treasury. The act which placed the clerks of the circuit courts upon a salary basis further requires them to collect and account for every fee accruing to their offices under the provisions of Sections 13407, 13409, 13410, or any other statute. Section 13407 fixes the fees to be charged for the services of the clerk in civil suits. Section 13409 fixes the fees that may be charged in criminal cases, and Section 13410 fixes the fees to be charged in naturalization proceedings. No mention is made of Section 717 but it is another statute fixing a fee for services of circuit clerks and would no doubt be included in the phrase "any other statute."

The first clause of Section 13408 previously mentioned, is as follows:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum: * * * * *."

The compensation fixed is for services, not one class of services but all classes of services in connection with their duties as clerks of the courts. The registering of jurors, both grand and petit, who are used in the circuit court, and the issuing of scrip to them, are duties which rightfully should be performed by the clerk of the court in which the jurors are used and would ordinarily be considered services which were included under the word "services" as used in Section 13408.

Section 717 is much older and fixed a fee for only one service.

The purpose of construing statutes is to ascertain the intention of the Legislature in enacting the bills. *Thompson v. City of Lamar*, 17 S. W. (2d) 960, 322 Mo. 514; *State v. Toombs*, 25 S. W. (2d) 10, 324 Mo. 819; *Artophone Corp., v. Coale*, 133 S. W. (2d) 343, 345 Mo. 344.

By using the word "services" it would seem to indicate the legislative intention was to have the compensation fixed to cover all services rendered by the clerks in connection with the holding of courts.

If it was the legislative intention that the salary fixed by Section 13408 should be in full for all services, as this section and the other sections enacted at the same time contain no words of repeal, we are in the situation of having a general statute fixing a salary for the performance of all services and a special section of the statute fixing a small fee for one service.

Ordinarily a special statute will prevail over a general one and remain in force when a later general act is passed, but it is well established that while implied repeals are not favored, a general act which clearly shows the legislative intent to repeal a special act, will take precedence and repeal by implication the special act. *Schott v. Continental Auto Ins. Underwriters*, 31 S. W. (2) 7, 1. c. 11:

"Appellant's argument in support of its contention under this head seems to run as follows: The act of 1925 (hereinafter called the act) is a general law; said article 13 relating to reciprocal and interinsurance contracts, including said section 6385, is a special law; section 6385 provides that no law of this state relating to insurance shall apply to the contracts of companies operating as reciprocals; the act does not in express terms repeal or amend section 6385; and a general law does not repeal a prior special law by implication. 'It is * * *

true that the presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act.' 25 R. C. L. 927; Sec. 177. But there is no rule which prohibits the repeal of a special act by a general one, the question being always one of intention. And there can be no doubt but that it was the legislative intention that the act should apply to contracts of reciprocal companies; by its express terms they are made subject to its provisions. The effect of the act in that respect, therefore, is to ingraft upon said section 6385 another exception.

"But it is said that if the act was intended to be in any respect amendatory of section 6385, it is to that extent void because violative of section 34, article 4, of the Constitution, in that it does not designate the words inserted and then set forth in full the section as amended. As to this it is sufficient to say that the constitutional provision mentioned has no application to repeals or amendments by implication. *Dorris Motor Car Co. v. Colburn*, 307 Mo. 137, 155, 270 S. W. 339."

And again, in *O'Malley v. Prudential Casualty & Surety Co.*, 80 S. W. (2d) 896, the following quotation is found at l. c. 897:

"We do not think that any such conclusion follows. Aside from the general proposition heretofore pointed out, that the insurance statutes were intended to be exclusive as to all matters to which they relate, we are also confronted with the general rule of statutory construction that a general statute will not be held to repeal a former statute

special in its nature unless the intent to repeal is manifest, or the two acts are so patently inconsistent that they cannot stand together. State ex rel. State Tax Commission v. Crawford, 303 Mo. 652, 262 S. W. 341; Hurlburt v. Bush, 284 Mo. 397, 224 S. W. 323; Folk v. City of St. Louis, 250 Mo. 116, 157 S. W. 71; State ex rel. McDowell v. Smith (Mo. Sup.) 67 S. W. (2d) 50."

The rule as pointed out in the O'Malley case seems particularly applicable to the situation here. For, if there was no repeal of Section 717 by the passage of the act of 1937, there exists one of two situations: first, there is a salary paid for all the services as clerk and then a fee fixed for the performance of one service; or, second, a salary fixed for the duties of the office and the officer required to collect a fee for one service from the county and immediately turn it back to the county. Either situation would be ridiculous and absurd.

In interpreting a statute the results to be arrived at may be considered. Bragg City Road District v. Johnson, 20 S. W. (2d) 22.

Statutes shall be given a sensible construction to effectuate the legislative intention and avoid unjust or absurd conclusions or results. Marler v. Marler's Estate, 104 S. W. (2d) 733, 1. c. 736:

"A statute will not be given a construction which will make it unreasonable or which will result in an absurdity. Stack v. General Baking Company, 283 Mo. 396, loc. cit. 410, 223 S. W. 89, and cases cited; Johnston v. Ragan et al., 265 Mo. 420, 178 S. W. 159; State v. Irvine, 335 Mo. 261, 72 S. W. (2d) 96, 93 A. L. R. 232."

And in the case of Chrisman v. Terminal R. Ass'n., 157 S. W. (2d) 230, 1. c. 234, the following statement is found:

"Statutes should receive a sensible construction, such as will effectuate the

Sept. 13, 1943

legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. * * * "

Conclusion

From the foregoing, the conclusion is reached that the passage of House Bill 177 by the 59th General Assembly, repealed what is now printed in the statutes as Section 717, R. S. Mo. 1939; that the circuit clerk is not entitled to receive the fee provided for therein and that he need not collect it from the county and return it to the county.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:EG

ROAD DISTRICTS: Publication of notices of filing of petition
ORGANIZATION: to form a special road district must comply
PUBLICATIONS: with statute.

January 16, 1943

Mr. R. P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein
you submit the following statement and question:

"In the month of November, 1942 under the
old Court a Special Road District was organized. It has been called to the attention
of the present Court that the publication
as provided under Section 8711, Amended
1941, page 529 which provides that three
publications are necessary. The order of
the Court organizing the Special District
states that the publication notice was published only twice instead of three times.

"The question, therefore, of the present
Court is, 'Shall they recognize the Special
Road District as a body politic and shall
the Treasurer pay out money to the new
district under the above facts?'"

Section 8711, at page 529, Laws of Missouri, 1941,
provides in part as follows:

"Whenever a petition, signed by the owners
of a majority of the acres of land within
a district proposed to be organized, and
setting forth the proposed name of the
district, and giving the boundaries thereof

and the number of acres owned by each signer of such petition, and the whole number of acres embraced therein, and the names of other owners of land within such boundaries so far as known, and the number of acres owned by each so far as known, and praying for the organization of a public road district in accordance with this article, shall be filed in the office of the clerk of the county court thirty days before the beginning of the next regular term of said court, the said clerk shall give notice by at least three publications in some weekly newspaper printed in the county and by at least five handbills put up at public places within the district of the presentation of said petition, and of the date of the beginning of the next regular term of the county court at which the same may be heard. Said notices shall contain the names of at least three signers of said petition and set out the boundaries of said proposed district, and shall notify all owners of land in the then existing district who may desire to oppose the formation thereof to appear on the first day of such regular term of court and file their written remonstrance thereto. * * * * *

It will be noted from the foregoing provisions of the section that in order for the county court to acquire jurisdiction over the subject matter of forming a special road district, the clerk of the county court must give notice of the filing of the petition for the formation of the special road district, "by at least three publications in some weekly newspaper printed in the county." This provision is a form of process. In speaking of constructive service in a suit against a non-resident member of a corporation, the court, in *Wilson v. The St. Louis & S. F. Ry. Co.*, 108 Mo. 588, 599, said:

"And it is entirely immaterial what is the means or method pointed out by the statute, or used in this instance, to acquire jurisdiction of the defendants, Seligman--whether by writ or notice, it is properly denominated 'process.' * * * * *

In State ex rel. Utilities P. & L. Corp. v. Ryan, 337 Mo. 1180, 1186, the court, in speaking of the necessity of complying with the provisions of statutes which provide for constructive service, said:

"* * * Service by publication or other substituted service is not only a statutory right but the requirements of the statute authorizing such service must be strictly complied with. (Chapman v. Chapman, 269 Mo. 663, 192 S. W. 448; St. Louis v. Williams, 235 Mo. 503, 139 S. W. 340; Stanton v. Thompson, 234 Mo. 7, 136 S. W. 698.) * * * * *

The statute in question requires the clerk to give the notice of the filing of the petition for the formation of the special road district by at least three publications in some weekly newspaper printed in the county. From the statement of facts which you have submitted we find that the county court by its order found that the publication of the notice for the formation of this district was published twice instead of three times. This record on its face shows that the statute was not complied with. From the principles announced above the county court did not acquire jurisdiction until the statutory provisions were complied with. If the court had no jurisdiction, then its order attempting to form the district was void.

CONCLUSION

It is, therefore, the opinion of this department that the publication of the notice of the filing of the

petition for the formation of a special road district having been published only twice instead of three times, did not give the county court jurisdiction to entertain the petition for the formation of the special road district. That any orders made by the county court pertaining to such special road district are null and void.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

COUNTY COURTS: Under Section 13713, R. S. Mo. 1939, must repair county buildings out of insurance monies.

January 16, 1943

Mr. Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department, as follows:

"Some time ago a small fire in our Courthouse resulted in \$500 damage, which amount was promptly paid by the insurance company holding the policy on that building. Our County Health Unit is in a building separate and apart from the Courthouse, but nevertheless is owned by Platte County, Missouri. This building needs repair and alteration at this time, in order to provide more office space, and the County Court has asked that I write to you this request for an opinion as to whether or not this \$500 may be used for repair and alteration of our County Health Unit. The question is--- may this money be used on another county-owned building, or must its use be confined to the Courthouse?"

It will be unnecessary to restate your question because it is stated in your request for an opinion.

The county court is of statutory origin and derives its power to act for the county from the statutes. State ex rel. Sanks v. Johnson, 138 Mo. App. 306.

Section 2480, R. S. Mo. 1939, under the topic, "County Courts," provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

It will be noted from this section that the county court has the control and management of the property, real and personal, belonging to the county.

Section 13730, R. S. Mo. 1939, provides as follows:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

This section specifically authorizes the county court to alter, repair, and build any county buildings and has been recognized and interpreted by the courts of this state as giving exclusive jurisdiction to the county courts to repair the county buildings. In the early case of Vitt v. Owens, 42 Mo. 512, the court stated that the county court has exclusive jurisdiction over the subject of repairs of county buildings.

Also, in the case of State ex rel. Bollinger, 219 Mo. 204, l. c. 223, the court said:

"Section 6736, Revised Statutes 1899, reads as follows: 'The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage.'

"Clearly that section of the statute gives the county court of Stoddard county jurisdiction over the subject-matters complained of in the petition; and the pleadings, evidence and report of the referees filed herein disclose the fact that the county has sufficient money on hand with which to pay for the proposed improvements. That being true, then the county court of that county was acting within its jurisdiction, and prohibition will not lie. (State ex rel. v. Reynolds, 209 Mo. 161; State ex rel. v. Riley, 203 Mo. 175.)"

It will be observed that Section 13730, supra, is the same as Section 6736, R. S. 1899, mentioned in the above opinion of the court.

The county has the authority and power, under the foregoing statutes, to alter, repair and build the county buildings. However, it would seem that the money derived from the insurance, by reason of the loss on the courthouse, would be restricted in its disposition and use by Section 13713, R. S. Mo. 1939, which provides as follows:

"In all cases where court houses or jails are insured, and are totally or partially destroyed by fire, windstorms or cyclones, the money realized on said insurance shall not be placed in the general revenue of the county, but shall be kept separate and apart, and be placed in a fund which shall be designated and known as a building fund, and that the same shall be used in erecting or repairing said court house or jail, or furnishing buildings or premises used for court house or jail purposes."

It will be seen that this section of the statute provides that when the courthouse or jail is insured and is totally or partially destroyed by fire, windstorm or cyclone, the money realized on such insurance by reason of such loss shall not be placed in a general revenue fund, but shall be kept separate and apart, and be placed in a fund which shall be known as a building fund. Therefore, these funds could not be used for any other purposes than as by this section provided. If, and when, all the necessary repairs to the courthouse have been made, the balance, if any, remaining could legally be placed in the general revenue fund of the county.

However, since the county court has specific authority, under Section 13730, R. S. Mo. 1939, to alter, repair and build any county buildings, it could use other public funds in the general revenue fund, if available for that purpose, to repair the building which belongs to the county and is separate and apart from the courthouse, and there could be no question of its authority to do so, that is, to repair the building in question belonging to the county.

CONCLUSION

It is, therefore, our opinion that the money paid to the county by the insurance company, by reason of the fire loss, must be used to repair the courthouse and the balance,

Mr. Robert P. C. Wilson III

-5-

1-16-43

if any, remaining could be turned into the general revenue fund of the county.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP

RECORDER OF DEEDS: The Recorder of Deeds, subject to the
OFFICE SUPPLIES: provisions of the Budget Act, may purchase
supplies necessary to keep and maintain
his office.

February 6, 1943

Miss Floyd Wilson
Recorder of Deeds
Jefferson County
Hillsboro, Missouri



Dear Miss Wilson:

This is in reply to yours of recent date wherein you
submit the following statement of facts and request:

"Will you please interpret Section
#13186 regarding the purchases of
supplies for the Recorder's office.
Also give me a ruling on Section
#13187 with reference to hire of
deputies, and who determines the
number to be employed and has the
power of setting the salaries to be
paid for such deputy hire.

"In the past, this office has always
purchased its own supplies, after
presenting a Budget to the Court and
having same approved. I have also
employed the deputy and assistants, as
the work in the office would warrant.
In the past I have had two girls in
the office, steady, and called an ex-
tra clerk when needed. Now, I am
meeting with a new County Court and I
understand they are to reverse this
policy and I want advice from you, as
to what Section of the Law they will
act on and on what Section I can make
my stand."

On the question of your duties relating to deputies
and retention of fees, I think this department has answered

that question by two opinions, a copy of each we are enclosing for your information, one to Hon. C. G. Vogt, Prosecuting Attorney of Nodaway County, Maryville, Missouri, under date of March 25, 1939, and the other to Hon. Walter G. Stillwell, Prosecuting Attorney, Marion County, Hannibal, Missouri, under date of September 17, 1936.

On the question of the purchase of supplies for your office, we find the following sections which are pertinent to your duties and the county court's duties in connection therewith.

First, we call your attention to Section 36 of Article VI of the Constitution of Missouri. This section authorizes the county courts to transact all county and such other business as may be prescribed by law. Section 2480, R. S. Mo. 1939, which is an enabling act to this section of the Constitution, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Referring to the office of recorder of deeds we find that Section 13147, R. S. Mo. 1939, provides as follows:

"There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

Also, Section 13148, referring to the same subject, reads as follows:

"The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books, in which the recorder shall record all instruments of writing authorized and required to be recorded. If there is no courthouse or other suitable county building at the seat of justice, the county court shall provide an office for the recorder at any other place in the county where there is a courthouse and courts of record are held."

Under Section 13148, supra, it is provided that the recorder shall keep his office at the county seat and the county court shall provide the office with suitable books in which to record instruments of writing authorized and required to be recorded.

Under Section 13186, R. S. Mo. 1939, the lawmakers made it the duty of the county to audit and settle the accounts of the recorder for books purchased for the use of his office and allow, in their discretion, such sum as may be reasonable to be paid out of the county treasury.

The County Budget Act has been passed since the foregoing sections became the law, but we do not find anything in the County Budget Act which would take away any of the authority vested in the recorder of deeds or the county court with respect to the purchase of supplies and paying for same for that office. However, all expenditures are subject to the provisions of the Budget Act to the extent that the officer may not spend in excess of the amount set out under the Budget Act for his office.

A question similar to yours was before the court in *Ewing v. Vernon Co.*, 216 Mo. 681. In that case the recorder had employed a janitor and paid for the same and then presented his bill to the county court for the amount so paid. In that opinion Judge Lamm, the writer of the opinion, said at 1. c. 689:

"It is believed that the fundamental constitutional maxims to the effect that all

government is instituted solely for the good of the whole people, is intended to promote the general welfare, and that private property shall not be taken or damaged for public use without just compensation, aided by a common sense construction of statutes evidencing a liberal and wise public policy as over against a narrow, cheese-paring one, have caused a public janitor service paid out of the common purse to be so long and universally used in public buildings and all public offices of cities and counties in Missouri, that the precise point has not hitherto come up for decision. The absence of such cases is of some significance; for a practical administrative policy worked out by the good sense of the thing, well known and uniformly acquiesced in, is not without force in construing our statutes. Show me, said a great judge, what has been done under a deed, and I will show you what the deed means. By the same token, show me what by the consensus of public official interpretation has been done under a statute, and I will show you what it probably means. * * * *

We are quoting the foregoing principles for the reason that recorders of deeds and other officers generally have purchased the supplies for their offices and then submitted the bills to the county court for payment. So, if the above principle were applied here it would follow that the recorder of deeds would purchase the necessary supplies for his office and present the bill to the county court for payment.

Also, in *St. Louis County Court v. Ruland*, 5 Mo. 269, which was cited in the *Ewing* case, *supra*, the clerk of the court furnished the fuel for the use of his office. The court, in that case, held that it was the duty of the county court to pay for this fuel.

Also, in the case of *Gannon v. Lafayette County*, 79 Mo. 223, it was held that the judge of the probate court could

compel the county court to repay him the outlay for a bookcase purchased for the office of the probate judge.

In dealing directly with these statutes the court, in the Ewing case, supra, at l. c. 692, said:

"Turning to the sections of the statutes regulating the office of recorder of deeds, we find them so meager as to cry out for help by construction. Their terms, then, must be read in the light of cognate sections and of the general policy of our laws. By Revised Statutes 1899, section 9055, it is ordained that the recorder of deeds 'shall keep his office at the seat of justice in each county' and that he 'shall provide the same with suitable books;' by section 9061 it is ordained that the county court shall 'audit and settle the accounts of recorders for books for the use of their offices.' There is not a word in the chapter (chap. 147), relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons, or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it. But when we read other provisions of the general statutes relating to building a courthouse and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish; and when we read in section 9057 that the recorder of deeds must give a bond conditioned that he will deliver up to his successor among other things 'the furniture and apparatus belonging to the office, whole, safe, and unfaced,' we but gather (what we knew before) that the furniture and apparatus do not belong to the recorder, but to the county, and under Revised Statutes 1899, section 1777, are under the control and management of the county court. Turning to other cognate sections it becomes plain that unless the Legislature deliberately planned to legis-

late against recorders and in favor of other county officers (an unthinkable position), it becomes plain that the county is to furnish the necessities in furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public. * * * * *

Again, at l. c. 693, the court made this further observation:

"* * * Is the general public not interested in and benefited by clean windows, clean floors, clean furniture, clean spittoons, heat in winter and wholesome, healthy air at all times in public offices? It is useless to argue that question. It answers itself. And if the county court, as the agent of the general public in county affairs, without legal right or excuse, refuses to do that duty in the recorder's office, what is the recorder to do? His only sensible course is to do what this recorder did, viz., avoid an unseemly wrangle, pay it out of his own pocket and trust to the courts and the law to reimburse him. * * * * *

In connection with this question, however, we call attention to the rule announced in *Lamar Twp. v. Lamar*, 261 Mo. 1. c. 189:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * * *

In *Disinfecting & Mfg. Co. v. Bates County*, 273 Mo. 300, the court, referring to the *Vernon County* case, said:

"It is not doubted that the statutes (Secs. 1571 and 1573, R. S. 1909) and the construction thereof by this court in a case to an extent analogous (*Harkreader v. Vernon County*, 216 Mo. 696) furnish authority to a sheriff of a county to purchase such articles and supplies as are requisite and necessary to keep and maintain the county jail 'in good and sufficient condition and repair.' * * * * *

By analogy, we may say that the recorder of deeds may purchase articles needed for his office and present the bill to the county court. Of course, the county court still retains its discretionary powers to determine what are reasonable sums to be paid for such supplies.

CONCLUSION

From the foregoing, it is the opinion of this department that the recorder of deeds, for the purpose of keeping and maintaining his office as is required by statute, subject to the limits set aside under the Budget Act for his office, may purchase necessary supplies, and that it is the duty of the county court to audit the accounts for such supplies and in its discretion to pay such sums as shall be reasonable for same.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TWB:CP

CITY OF THE THIRD CLASS--not authorized to invest "reserve fund" in United States Bonds.

April 15, 1943

4/19



Hon. Fred F. Williams, Supt.
Municipal Lighting and Water System
Poplar Bluff, Missouri

Dear Mr. Williams:

The Attorney General wishes to acknowledge receipt of your letter of April 12, 1943, in which you request an opinion as follows:

"The city of Poplar Bluff has a Municipal Light and Water Plant which is operated under the direction of the Board of Public Works.

In the operation of these plants there has been created a reserve fund which has been carried on deposit in the local banks. These funds could be used, or rather invested, through the purchase of United States Savings Bonds, if such purchase will come within the limitation of the law governing such funds.

Will you please advise as to the legality of such a transaction and if such funds can be so invested."

Statutory authority exists for the investment of public funds for United States Bonds in numerous instances. County and municipal sinking funds may be so invested. Sections 3287, 3288, 13782 and 13783, school funds under certain circumstances may also be invested in such manner, sections 10335, 10704, 10871 and 10874 and cities of the first and second classes have authority to purchase United State Bonds with portions of their funds. Sections 6385 and 6834 respectively. But no such authority is given to a city of the third class.

Cities of the third class are those containing three thousand inhabitants and less than thirty thousand inhabitants, Section 6214 R. S. Mo. 1939. By the 1940 census, Poplar Bluff had a population of 11,163 and is therefore a city of the third class. Cities of this class have authority to own and operate light and water plants. Constitution of Mo., Article 10, Section 12 and 12a and Section 6961 and 6967 R. S. Mo. 1939.

Municipal corporations possess two classes of powers, governmental and legislative powers and private or proprietary powers. In owning and operating light plants and water plants, cities are held to be exercising the private or proprietary powers. Dillon on Municipal Corporations, (5th Edition), Volume 3, Section 1303, page 2134:

" * * * Although it is probably impossible to lay down any rule by which it can be determined in all cases where its legislative, governmental, and discretionary functions end, and the so-called private and proprietary character of its acts begins, there are cases that hold that in executing and carrying into effect the powers conferred upon it by constructing and erecting its own water or lighting plant, in managing and operating the plant, and in the furnishing and distribution of water or light to inhabitants and consumers, it acts or under certain circumstances will be considered to act in a proprietary and individual capacity rather than by virtue of its legislative and governmental functions. * * *"

In the operation of light and water plants, large sums of money would be collected for electricity, gas and water.

The statutory provisions applying to the funds of cities of the third class are found in, Section 6939 R. S. Mo. 1939, requiring the selection of a city depository, Section 6940 R. S. Mo., 1939, requiring the depository to give bond in double the amount of the revenues of the city for any year,

Section 6941, R. S. Mo. 1939, requiring the city treasurer to deposit all funds in a selected depository, and Section 6945 R. S. Mo. 1939, which ^{the} directs the manner of investing sinking funds of the city.

No mention is made in the Statutes of any provision made for a "reserve fund" in connection with a municipally operated light or water plants.

At this point it is desired to call to your attention that your letter fails to state from what source the "reserve fund" is derived, and we are assuming it is derived solely from the operation of the plants and the sale of electricity or gas and water to consumers.

In considering the power of a city to take any action, there is one fundamental rule which must be borne in mind. In the case of *St. Louis vs. Kaime*, 180 Mo. at l.c. 322, the Supreme Court cited this rule from *Dillon on Municipal Corporations*, 4th Edition, Volume 1, page 145., the rule is as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." (Vol. 1 (4 Ed.), p. 145)"

This rule is also applied in the cases of *Bull vs. McQuie*, 119 S. W. (2d) 204, and *Ex Parte Williams*, 129 S. W. (2d) 929.

The city council of a city of the third class is the law-making body of the city, and the duties and powers of the city council are set out in Section 6949 and 6950 R. S. Mo., 1939.

Section 6949:

"The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Section 6950:

"The council shall enact ordinances to prohibit and suppress houses of prostitution and other disorderly houses and practices, and gambling houses and all kinds of public indecencies, and may prohibit the selling or giving intoxicating liquors to any minor or habitual drunkard. The council shall also enact ordinances to restrain and prohibit riots, noises, assaults and battery, petit larceny, disturbances of the peace, disturbances of religious and other lawful assemblies, indecent shows, exhibitions or concerts in any street, house or place in the city, disorderly assemblies, and to regulate, restrain and prevent the discharge of firearms and the keeping and discharge of rockets, powder, fireworks or other dangerous combustible materials in the streets or in the limits of the city. The city council may also regulate and control the construction of buildings, the construction and cleaning of fireplaces, chimneys, stoves and stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business which may be dangerous in causing or promoting fires, and may provide for the

inspection of the same. The council may also provide, by ordinance, limits within which no building shall be constructed except of brick or stone or other incombustible materials, with fire-proof roofs, and impose a penalty for the violation of such ordinance, and may cause buildings commenced, put up or removed into such limit, in violation of such ordinance, to be removed or abated. The council may also purchase fire engines, hook and ladder outfits, hose and hose carts, buckets and all other apparatus useful in the extinguishing of fires, and organize fire companies, and prescribe rules of duty for the government thereof, with such penalties for the violation thereof as they may deem proper, not exceeding one hundred dollars, and to make all necessary expenditures for the purchase of such fire apparatus and the payment of such fire companies. The council may, by ordinance, regulate and fix reasonable maximum rates and charges for the rental and use of telephones and telephone service within such city, and the price and quality of water, gas, gasoline, petroleum, electric lights and other means of lighting furnished by any person, firm or corporation operating under any franchise granted by the city, and may prescribe the candle power of the gas and electric lights furnished the city and private consumers. The council may, by ordinance, regulate and fix reasonable maximum rates, charges and prices of steam heat or other means of heating furnished by any person, firm or corporation operating under any franchise granted by the city, and may prescribe the pressure to be maintained, on its mains, by any steam heating company, person or firm operating the same."

Section 6949, supra, may be called the "general welfare clause" of the city charter. And it would seem that

April 15, 1943

under this section of the statute, absent any other statutory provision, the council might be authorized to enact an ordinance creating a reserve fund and providing for the investment of it. This requires a consideration of the authority conferred by Section 6949, supra. The Springfield Court of Appeals in the case of State ex rel. Smith vs. Berryman, 142 Mo. App. 373, had before it a similar section and spoke in the following manner at l. c. 383:

"The 'general welfare clause' as generally understood, is like adding general words to special ones in a statute, and not to be considered as overruling or enlarging the powers expressly granted. (St. Louis v. Kaime, 180 Mo. 309, 79 S.W. 140; 1 Dillon on Municipal Corporations (4 Ed.), 392, 393; Ruschenberg v. Railroad, 161 Mo. 70, 61 S. W. 626.)

In the first case above cited, Judge Fox quotes approvingly from Dillon, as follows: 'Occasionally, the charter or incorporating act, without any special enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases, and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., not inconsistent with the Constitution or laws of the State. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed 'the general welfare clause,' if it stood alone, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions. When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised

in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters.'

In *State v. Butler*, 178 Mo. 272, we find the rule to be declared as follows: 'The powers of a municipal assembly to pass by-laws under a general welfare clause, can never be exercised to enlarge or annul specific provisions.'

The light and water plants need to be maintained and to have provisions made for replacement. Such matters could not be well taken care of by current revenue as the current revenue of any year would hardly be sufficient to meet replacement costs. If the inhabitants are to receive the best service and full benefit from the plants, some method should be devised for providing a "reserve fund" for these purposes out of the profits of the operation of the plants.

There being no statutory provision for taking care of such a "reserve fund", preserving it by the most advantageous method until needed, it would appear reasonable and logical that the council by ordinance could make provision for setting up such a fund and its investment in safe securities until needed. And this is especially true for the statutes relating to the funds of cities of the third class seem to contemplate only the safe keeping of the current annual revenue for any one year (bond being required to be given for double the revenue of any year). However, cities acting in their proprietary character are bound by statutes which limit their powers. *Flinn vs. Gillen*, 10 S. W. (2d) 923 1. c. 926 (Mo. Sup.)

"The principle of the common law, that the sovereign is not bound by general terms of statutes which would restrict his powers, does not apply to cities in the exercise of their municipal powers; that is, the exercise of powers ministerial or proprietary in character. In *County of St. Charles v. Powell*, 22 Mo. 525, it is said (loc. cit. 528, 66 Am. Dec. 637):

April 15, 1943

'The immunity, however, it seems, was, even at common law, an attribute of sovereignty, only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state.'

See, also, Hunter v. Pinnell, 193 Mo. 142, 91 S. W. 472; Palmer v. Jones, 188 Mo. 163, 85 S. W. 1113; Lumber Co. v. Craig, 248 Mo. 330 154 S. W. 73; Dunklin County v. Chouteau, 120 Mo. 577, 25 S. W. 553."

The city of Poplar Bluff has such powers as are especially granted to it and those powers which are necessarily implied as indispensable for the carrying out of the express powers. While it might be advantageous to the citizens to have created a "reserve fund" to be built up from the profits of the operation of the light and water plants, to be used for replacement or repair purposes, such a fund is not absolutely indispensable, for the plants may be replaced or repaired as originally acquired. And the rates could be lowered or the profits used in defraying expenses of the city. There is a definite prescribed method of handling the funds of the city.

CONCLUSION

No statutory provision exists for the investing of any "reserve fund" derived from the operation of the light and water plants in United States Bonds.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh

POISONS: Record of sale of poisonous substances used in the arts or as insecticide, not necessary.

April 29, 1943.



Mr. Ted D. Willard, Secretary
State Board of Pharmacy
Camdenton, Missouri

Dear Mr. Willard:

The Attorney-General wishes to acknowledge receipt of your letter of April 27th requesting an opinion of this Department. Your letter of request reads as follows:

"Section 10018 of Chapter 60 of the Revised Statutes of Missouri, 1939, provides, in part:

"* * * * Nor shall it be lawful for any registered pharmacists, to sell any poisons included in schedule 'A' without, before delivering the same to the purchaser, causing an entry to be made in a book kept for that purpose, stating the date of sale, name and address of purchaser, the name of poison sold, the purpose for which it was represented by the purchaser to be required and the name of the dispenser."

"Section 10005, further provides, in part:

"nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes."

April 29, 1943

"The Board of Pharmacy would like to know if in your opinion a record of the sale of arsenic and its preparations must be kept by stores other than drug stores and pharmacies who are offering these poisons for sale as insecticides and in the event such a record is required whose duty is it to enforce this portion of the Statutes?"

Chapter 60 of the Revised Statutes of Missouri for 1939, is entitled "Druggists and Pharmacists -- State Board of Pharmacy." The purpose of this chapter is primarily for the regulation of persons engaged in that particular occupation. An examination of Section 10005, R. S. Mo. 1939, contained in the above named chapter, will show that its primary object is to prevent a person engaged in the drug business from compounding, dispensing or selling at retail, any drug, medicine or poison, except under the supervision of a person licensed as a pharmacist. The effect of this section is, that a registered pharmacist may prepare and compound medicines and other preparations containing the various forms of poison, and in so doing is necessarily given the authority and permission to "break" the original package in which he receives such poison. It is, we think, apparent that this right to use poisons in compounding medicines and other preparations which is given to the registered pharmacists, is one of the reasons for the stringent rules as to the qualifications of persons engaging in that profession.

However, the statutes setting up the right of the Board of Pharmacy to examine applicants for this type of work, is not the only safeguard to the general public. Section 10018, R. S. Mo. 1939, further provides that no registered pharmacist shall sell or dispense any poisons designated in such section (one of the poisons being arsenic, with which we are concerned in this instant opinion) unless he keep a record in a book kept for such purpose, setting out certain facts relative to such sale, as set out in Section 10018, supra.

Now the question arises as to whether or not such a record shall be kept in the case of poisonous substances sold

April 29, 1943

exclusively for use in the arts, or for use as insecticides. It will be noted, from the portion of Section 10005, quoted in your request, that these substances must be sold in "unbroken" packages bearing a certain type of label, and thus negatives the right of a person not a registered pharmacist, from mixing and compounding such poisonous substances.

It will further be seen that the sale of poisonous substances to be used in the arts and for insecticide, is specifically exempted from the provision requiring that anyone compounding or selling at retail any poison, must be a registered pharmacist or under such pharmacist's supervision. In construing statutes, it is always important that the intention of the Legislature in the enactment of such statutes, be ascertained if possible. The Supreme Court in the cases of *City of St. Louis v. Senter Commission Co.*, 85 S. W. (2d) 21, 337 Mo. 238, and *Graves v. Purcell*, 85 S. W. (2d) 543, 337 Mo. 574, held that the primary rule of the construction of statutes is to ascertain and give effect to the lawmakers intent, and this should be done from the words used, considering the language honestly and faithfully. Obviously, the intent of the Legislature in passing section 10005, supra, was that the sale of poisonous substances in an unbroken package for art work or for use as an insecticide, was not to be included in the regulation requiring that the sale of drugs, medicine and poisons at retail be under the supervision of a registered pharmacist.

Again invoking the rule of construction stated above, we call your attention to Section 10018, supra. This, in part, provides that "registered pharmacists" can not sell certain poisons, among them arsenic and its preparations, unless a record is kept in a certain manner. This provision is clearly unambiguous, and considering the language "honestly and faithfully," as we are admonished to do by the Supreme Court, we can not say that it is necessary for persons who sell poisonous substances for use in art work or for insecticides, to be compelled to keep a record as required by registered pharmacists in the sale of certain poisons, as required by Section 10018, R. S. Mo. 1939.

April 29, 1943

Conclusion

Therefore, it is the opinion of this department that the keeping of records of sales of certain poisons, as required in Section 10018, supra, does not apply to the sale of poisonous substances sold for use in art or as an insecticide, when sold in unbroken packages.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKEETICK
Attorney-General

JLP:EG

SPECIAL ROAD DISTRICTS: May spend one-fourth of their revenue on streets of cities located in such districts.

August 23, 1943



Hon. H. Calvin Wilson, Chairman,
De Soto Special Road District
502 Jefferson Street
De Soto, Missouri

Dear Mr. Wilson:

The Attorney-General wishes to acknowledge receipt of your letter of August 17, 1943, in which you requested an opinion of this Department. This request, omitting caption and signature, is as follows:

"The undersigned De Soto Special Road District Board, of Jefferson County, Missouri, desire information as to the method that money of said road district may be spent in the city limits of an Incorporated City.

"The officials of the City of De Soto, Mo. have asked the De Soto Special Road District to give the said City of De Soto, Mo. a sum of \$500. to be spent on streets in the City of De Soto, Mo.

"Kindly advise if the Special Road District is empowered to give the City of De Soto, Mo. any sum of money to be used in the City Limits of said town, or in what manner such funds should be handled, should the said special road district feel inclined to make improvements in the City Limits of said incorporated town, and any other suggestion you may have to offer on this subject."

In view of the fact that the above request did not state what type of special road district was involved, a letter

August 23, 1943

was written by the undersigned requesting information as to that fact, and on August 21, 1943, you wrote a letter to this Department with the following contents:

"In reply to yours of 18th, in regard to information desired by the DeSoto Special Road District, will say that the district is 'Eight Mile District,' as this district is eight miles square."

Article 10, Chapter 46, Revised Statutes of Missouri, 1939, deals with special road districts of the type of which you are a officer, which is a road district not exceeding eight miles square.

In answer to your inquiry as to whether or not a special road district such as this one may expend part of its funds for improvement to a city street, which city is located in such road district, we wish to cite you to Section 8683, R. S. Mo. 1939. This section is as follows:

"Said board shall have authority to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district in conformity with the established grade of said roads and streets in said cities and for the purpose of constructing and maintaining macadam, gravel, rock or paved roads or streets within the corporate limits of any city within the said special road district in conformity with the established grade of said roads and streets in said city: Provided, that no part of the revenue of any special road district in this state be expended outside of the county in which such special road district is situated."

August 23, 1943

This section specifically states that a road district such as the one in question may expend one-fourth of its revenue on the roads and streets of any city within such road district's limits. However, we do not feel that such revenue should be turned over or given to such city for the purpose of the improvement of its roads and streets. The board is given authority to expend one-fourth of its revenue and we think that in order to expend such revenue it is necessary that the work be done by the road district on the city streets and that it pay the costs of same. However, we do not believe, as stated above, that one-fourth of the revenue of the district should be turned over to the city to expend on their streets as they see fit. We might further state, in answer to your question as to whether a sum of \$500.00 could be turned over to the City of De Soto, that this amount may be expended if it does not exceed one-fourth of the revenue of the special road district.

Conclusion

Therefore, it is the opinion of this Department that under Section 8683, R. S. Mo. 1939, a special road district, to-wit, of the type authorized under Article 10, Chapter 46, R. S. Mo. 1939, has authority to expend one-fourth of its revenue on the streets of the city which is located in its limits, but such work must be done by the road district itself and the amount of money expended shall not exceed one-fourth of the revenue of such road district.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

SHERIFF'S
FEES.

Services in connection with orders
of State Board of Health in venereal
disease control.

August 24, 1943

Honorable John H. Williams
Sheriff, Dunklin County
Kennett, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you request an opinion from this department on the question of your charges for board and commitment fees for venereal disease patients who have been ordered by the State Health officials to be apprehended and held by you in the jail for treatment, etc.

It could not be successfully maintained that these are criminal cases. Therefore, the criminal fee statutes do not apply.

In the case of State ex rel. v. Brown, 146 Mo., 401, the court has ruled that a sheriff is not entitled to a fee unless expressly allowed by statute. You must therefore, point the statute authorizing this fee before you may claim it.

The only statute that we find which might be pertinent is found at Sec. 9758, R. S. 1939.

This section reads as follows:

"The county court or city council in any such city shall have power to appropriate money out of the current revenues of the county or city, as the case may be, for the purpose of carrying out the provisions of this article."

C O N C L U S I O N .

From this section it is within the discretion

Hon. John H. Williams,

-2-

Aug. 24, 1943

of the County Court to appropriate money to carry out the provisions of Article 1, Ch. 57, R. S. 1939, which includes the control of venereal diseases.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

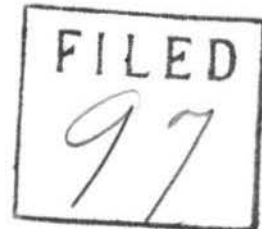
ROY MCKITTRICK
Attorney General

TWB:LeC

SPECIAL ROAD DISTRICTS: (1) Possession of records and books to be in the clerk of the board of commissioners;
(2) Treasurer of special road district shall furnish a bond.

September 10, 1943

9-11



Mr. William Winkelman
Wayland
Missouri

Dear Mr. Winkelman:

The Attorney-General wishes to acknowledge receipt of your letter of August 24th, in which you request an opinion from this department. Your opinion request, omitting caption and signature, is as follows:

"I wish to ask you a question concerning the rights of members of a Special Road District. The Wayland Special Road District has three commissioners and a Sec. & Treasurer. One commissioner has been refused access to the books and records of this district. Can or can not this commissioner demand that the books and records of this district be in his possession just for the time that he needs to look over them? If he does have this right, what procedure must he use to obtain the books and records.

"Also, is the Treasurer of this Road District compelled to be bonded?"

There was some information desired in order for an opinion to be written on this matter, and therefore this department wrote you on August 27th the following letter:

"Your request for an opinion of this department relative to a special road district located in your county, has been received.

Sept. 10, 1943

"In order for us to arrive at a conclusion in this matter it will be necessary for us to know what type of special road district you have in operation. As you are probably aware, there are several different types and different statutes apply to each one. Therefore, we wish you would write us giving us this information, and also as to what you mean by "books." In other words, we are not able to answer your request as to the access to these books and records unless we know what type books and records they are."

In response to such letter we received a second letter from you, dated September 3, 1943, which letter is as follows:

"Received your letter asking for more data as to how the District was formed as the Wayland Special Road District in 1919 under Article Six, Chapter 102 and amendments thereto of Revised Statutes of 1909. It doesn't exceed 8 square miles and contains an incorporated town of Wayland.

"By 'book,' I mean the book that the Sec-Treas. keeps the income & expenses of the district. By 'records' I mean the contracts, agreements and deeds of which the District is a party.

"Also, I wish to know whether the person, not a member of the board, is required by law to be bonded to be Sec-Treasurer of said district."

In your letter of September 3, 1943, set out above and explaining the meaning of the term "book" as used in your original request for an opinion, you stated that you referred to the book in which the "Sec-Treas. keeps the income & expenses of the district." Also, the statement was made that

the special road district in question was organized under Article 6, Chapter 102, and amendments thereto of the Revised Statutes of 1909. This part of the statutes corresponds to what is now Article 10, Chapter 46, R. S. Mo. 1939.

In an effort to answer your question we wish first to cite you to Section 8678, R. S. Mo. 1939, which provides as follows:

"Such commissioners shall, within ten days from the receipt of such notice, meet and organize by selecting one of their number as chairman and one as clerk. The clerk shall keep full and accurate record of the proceedings of the board, and perform such other duties as may be required of him by the board."

It will be noted from the foregoing statute that the "clerk" of the board of commissioners is to be one of the commissioners. Furthermore, he is to keep a full and accurate record of the proceedings of the board and "perform such other duties as may be required of him by the board." In your letter you refer to "Sec-Treas." We will assume that by "secretary" you refer to the clerk of the board of commissioners. In order to arrive at a solution of the problem we must further indulge in the presumption that the board of commissioners of the Wayland Special Road District has assigned to the aforesaid clerk of the board as one of his "other duties," the duty of keeping the records and books of the road district. Proceeding on these premises we find that the clerk has possession of the books and records of the road district and that it is his duty to both keep and protect such property.

The question then arises whether one of the commissioners has the right and authority to demand that the clerk deliver such books and records into his possession for the purpose of inspection and examination and whether the clerk in answer to such demand must deliver over such property. We should first consider the capacity in which the clerk has the books and records in his possession. Under the statutes cited above he must be one of the commissioners of the road district

but he is not in possession of the books and records for that reason but is in possession of them because he has been appointed the clerk of the board of commissioners. It is true that under the circumstances, such as this, one commissioner has possession of this property, but he holds such property as the clerk. It is, of course, common knowledge that as a general rule, where any clerk is given the duty of keeping books and records of any body, such books and records remain in the possession of the clerk. He is charged with the responsibility of keeping correct records of the proceedings of and before the body of which he is the ministerial officer and it must be admitted that he then should be entitled to the possession of such books and records to insure against alterations of any kind.

We do not mean to hold by this opinion that any one commissioner may not have the right of inspection and examination of such records, since we feel that they are public records, at least so far as the inhabitants of that particular road district are concerned. As these are public records, the commissioners have the authority to inspect and examine them. However, we do feel that the actual possession of such records and books should remain in the clerk of the special road district.

Your other question is whether the treasurer of the Wayland Special Road District shall furnish a bond. With reference to this query we should like to cite you Section 8679, R. S. Me. 1939, which prescribes as follows:

"Said board may appoint a treasurer and fix the amount of his bond and prescribe his duties, which said bond shall be filed in the office of the clerk of the county court."

It will be noted that the above statute provides that the "board may appoint a treasurer" for the road district, and in reading the remainder of the section it might be argued that it is discretionary with the board of commissioners as to whether a bond shall be furnished. However, we feel that if a treasurer is appointed under the provisions of this statute, it is compulsory on his part to furnish a bond to indemnify the inhabitants of the special road district.

Conclusion.

Therefore, it is the opinion of this department that the books and records of a special road district, organized under Article 10 of Chapter 46, R. S. Mo. 1939, shall remain in the actual possession of the clerk of such special road district, who has been appointed by the board of commissioners. It is further our opinion that where a treasurer is appointed under the provisions of the statutes for such special road district, it is his duty to furnish a bond as provided by Section 8679, R. S. Mo. 1939.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

PHARMACY: Household remedies and drugs which may be sold
in general stores.

September 17, 1943

9/23



Mr. Ted D. Willard, Secretary
State Board of Pharmacy
Camdenton, Missouri

Dear Mr. Willard:

Under date of August 25, 1943, you wrote this
office requesting an opinion as follows:

"I am enclosing a copy of a letter
from the Independent Grocers' Alliance
Distributing Co., 309 West Jackson
Blvd., Chicago, Illinois, and, also,
a copy of the letter which I have
written them.

"I would appreciate your furnishing me
with an opinion as to the disposition
of their products as per their request."

Section 10005, R. S. Mo. 1939, of which you are
familiar, prohibits any person not licensed as a pharmacist
from conducting a pharmacy for the retailing of drugs, medi-
cines, chemicals or poisons. This section is in part as
follows:

"It shall be unlawful for any person
not licensed as a pharmacist within
the meaning of this chapter to con-
duct or manage any pharmacy, drug or
chemical store, apothecary shop or
other place of business for the re-
tailing, compounding or dispensing of
any drugs, medicines, chemicals or
poisons, or for the compounding of
physicians' prescriptions, or to keep

Sept. 17, 1943.

exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. * * * * *

Provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, and in any locality where there is no licensed pharmacist, the ordinary household remedies and such drugs or medicines as may be specified by the board of pharmacy shall be permitted to be sold by those engaged in the sale of general merchandise: Provided further, * * * * *

The portions of the section which are pertinent to your inquiry are set out above and are the exception clauses.

Accompanying your letter of request was a letter from the national headquarters of the Independent Grocers' Alliance Distributing Company, containing a list of products of this organization which it desires to have offered by retailers for sale in grocery stores and general merchandise stores in this State. The list is as follows:

"Castor Oil (U.S.P. cold pressed),
Epsom Salt (U.S.P.), 1# sealed package to
retail for 15¢
W. P. T. Cough Syrup (White Pine & Tar.)
Contains no opiate. 3-ounce bottle
retails for 25¢
Mercurochrome, 1/4 ounce applicator bottle
to retail for 10¢
Milk of Magnesia (U.S.P.), pint bottle to
retail for 28¢
Extra Heavy Mineral Oil (U.S.P.) 345 to
360 Vis., pint bottle retails for 48¢

Mouth Wash (Liquor Antisepticus N.F.)
pint bottle to retail for 43¢
Witch Hazel (Dickinson's), pint bottle
to retail for 48¢
Soluble Saccharin (1/2 gr. amber bottles
100s). No nutritive value-only a
sweetening agent for beverages.
Retails for 25¢
Boric Acid Po. (U.S.P.) 1/4# sealed
package retails for 15¢
Isopropyl Alcohol Rubbing Compound
(70% Isopropyl Alcohol) Pint Pinch
Bottle retails for 33¢

"We also had U.S.P. Glycerine in 3-ounce
bottles which has been discontinued for
the duration, as is also Camphor Oil in
3-ounce bottles."

From the records of the Board of Pharmacy we learn that in accordance with the authority conferred by Section 10005, supra, the Board has compiled a list of certain drugs and medicines which it has authorized to be sold as household remedies and which may be sold in general merchandise stores in any locality where there is not a licensed pharmacist. Comparing the list of products submitted by the Independent Grocers' Alliance Distributing Company with the list designated by the State Board of Pharmacy, we find that the following products have been declared to be products which may be sold in general merchandise stores in any locality in which there is no pharmacist:

- (1) castor oil
- (2) epsom salt
- (3) boric acid
- (4) mineral oil
- (5) glycerine
- (6) camphorated oil
- (7) rubbing alcohol

We have further ascertained from the records of the State Board of Pharmacy that it has declared certain drugs and products are not proprietary or patent medicines and that they may be sold only under the supervision of a licensed pharmacist,

except such of these as may be included within the list of products designated for sale in general stores. Comparing the list submitted by the Independent Grocers' Alliance Distributing Company with the list of products declared not to be patent or proprietary medicines, we find that the following products which the Independent Grocers' Alliance Distributing Company wishes to offer for sale are included in this list:

- (1) boric acid
- (2) castor oil
- (3) epsom salt
- (4) mercurochrome
- (5) milk of magnesia
- (6) mineral oil
- (7) rubbing alcohol
- (8) glycerine
- (9) camphorated oil

Some of the last above mentioned products are included within the list of household remedies and drugs which may be sold in general merchandise stores in any locality in which there is no pharmacy and unless they are included within this list then they may be sold only under the supervision of a registered pharmacist.

This brings us to a discussion of the other exception, patent and proprietary medicines. The following definitions of "patent medicines" are cited for your guidance:

"Patent medicines are medicines prepared for immediate use by the public, put up in packages or bottles labeled with the name and accompanied with wrappers containing directions for their use and the conditions for which they are specifics. State v. Donaldson, 42 N. W. 781, 41 Minn. 74."

"Unlicensed retailer's advertisement of 'patent medicines' held not violative of statute making unlicensed retailer's advertisement for sale of 'drugs' or 'medicines' misdemeanor. Education Law, Sec. 1364, schedules A--C. Prohibition of

Education Law, Ec. 1355, as amended by Laws 1930, c. 835, Sec. 1, against unlicensed retailer's advertisement for sale of 'medicines,' did not apply to advertisement of 'patent medicines' authorized by section 1361 to be sold by such retailers, since generic term 'medicines' has meaning in public mind different from phrase 'patent medicines,' which is colloquial name for 'proprietary medicines' put up by manufacturers or compounders under trade-names. Furthermore, in buying 'patent medicines' public does not rely on presumed or actual skill of retailer, as is the case when other compounds or prescriptions are purchased. *People v. Bernstein*, 261 N. Y. S. 381, 237 App. Div. 270."

Words & Phrases, Vol. 31, p. 423.

And the following definitions of "proprietary medicines" are also cited:

"'Proprietary medicines,' within a statute, making it an offense to practice medicine without having secured a certificate from the state board of medical examiners, but providing that it shall not prevent the advertising and sale of patent and proprietary medicine, means medicines which some person or company, other than a person indicted for prescribing certain medicines without a license, manufactured, advertised, and sold. *State v. Kendig*, 110 N. W. 463, 465, 133 Iowa, 164.

"Prohibition of Education Law, Sec. 1355, as amended by Laws 1930, c. 835, Sec. 1, against unlicensed retailer's advertisement for sale of 'medicines,' did not apply to advertisement of 'patent medicines' authorized by section 1361 to be sold by such retailers, since generic term 'medicines' has meaning in public mind different from

phrase 'patent medicines,' which is colloquial name for 'proprietary medicines' put up by manufacturers or compounders under trade-names. Furthermore, in buying 'patent medicines' public does not rely on presumed or actual skill of retailer, as is the case when other compounds or prescriptions are purchased. *People v. Bernstein*, 261 N. Y. S. 381, 237 App. Div. 270."

Words & Phrases, Vol. 34, p. 603.

Again referring to the list of products furnished by the Independent Grocers' Alliance Distributing Company, we find:

"W.P.T. Cough Syrup (White Pine & Tar)" and
"Mouth Wash (Liquor Antisepticus N.F.)",

which would seem to be within the definitions of "patent" and "proprietary medicines."

This leaves only two items on the list submitted by the Independent Grocers' Alliance Distributing Company which have not been discussed:

Witch Hazel and
Soluble Saccharin.

They are not in the list of household remedies and drugs which the State Board of Pharmacy has designated is suitable for sale in general stores in any locality where there is no pharmacy and in the mind of the writer do not fall within the definitions of "patent" and "Proprietary medicines" and therefore could not be sold except under the supervision of a registered pharmacist.

In discussing the products mentioned herein, they have been considered only in the light of the Missouri laws relative to the practice of pharmacy and there has been no attempt to pass upon their eligibility to be sold under the Pure Food

Mr. Ted D. Willard

-7-

Sept. 17, 1943

and Drug Acts of this State and the Federal Government.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

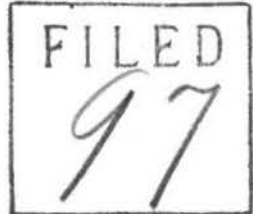
WOJ:EG

COUNTY TEXTBOOK COMMISSION: Statute creating county school textbook commission imposes mandatory duty on county court to appoint members of the commission. This duty may be enforced by mandamus action.

October 11, 1943

Honorable J. M. Wilson, Superintendent
Cole County Schools
Jefferson City, Missouri

10/16



Dear Mr. Wilson:

This will acknowledge receipt of your letter of recent date in which you request an opinion from this office, the full text of this request, omitting caption and signatures reading as follows:

"In Cole County there has not been a County School Text Book Commission or County Board of Education for about 13 years or more. Text books have been selected and specified by the former Superintendent of Schools throughout this period, without services of any such Commission or Board.

"The State Board of Education has appointed a member of the Text Book Commission and I have requested the County Court to do so. The County Court has deferred, saying that it does not believe such Commission is necessary and that the former Superintendent said one was not needed.

"I desire to know what I should do under these circumstances. Section 10636, R. S. Mo. 1939, provides for the appointment of such a Commission and it is my belief that there is no authority in me as County Superintendent of Schools to perform the duties of such Text Book Commission.

"I desire an opinion stating whether or not the Statutes make it mandatory for the County Court to appoint a member of such Commission and what remedy is available to me under the above circumstances."

In order to maintain and establish a uniform course of study and to provide for and establish uniform textbooks in the State of Missouri our Legislature passed an act providing for the textbooks to be used in the schools of this State. This act originally was passed in 1891 and has been revised in certain respects in 1909, 1929 and 1939. Section 10636, R. S. Mo. 1939, creating a textbook commission, reads as follows:

"There is hereby created a county school textbook commission, which shall be the county board of education in all counties in which such a board exists. In counties where there is no county board of education the school textbook commission shall consist of the county superintendent of schools and two teachers, who shall be selected in the following manner: One member to be appointed by the County Court in each county and one member to be appointed by the state board of education, the appointments to be made in April, 1939, and every two years thereafter: Provided, that no person shall be appointed to serve on the said commission who has been in the employ, as a traveling salesman or otherwise, in this state, of any publisher of school textbooks within the period of two years prior to this article. Vacancies on the commission, resulting from death, resignation, removal from the county, disqualification, or otherwise, shall be filled as prescribed by law. A majority of the commission shall constitute a quorum for the transaction of all business of the commission."

Section 10637, R. S. No. 1939 reads as follows:

"The county textbook commission shall meet at the county seat to organize within thirty days from the date of the taking effect of this article. The county superintendent shall be ex officio president of the commission, and a secretary shall be elected from its own membership. Said commission shall meet annually thereafter, and special meetings may be called by the president, or on the written request of the other two members. The president shall preside at all meetings of the commission, and the secretary shall keep the records of the meetings, and all contracts shall be signed by both the president and secretary. Members of said commission that do not receive an annual salary from the county shall receive five dollars per day for their services, with such additional amount as shall be necessary to cover their actual traveling expenses: Provided, that they shall receive pay for not to exceed six days in any one year, the same to be audited and paid by the county court."

This statute is clear and its terms are unambiguous and need no construction on our part. The Legislature obviously intended the creation of this commission and, in very definite terms, set out the duties in connection with the administration of this section.

Concerning ourselves now with the powers and functions of the county court as such, we find in 15 C. J. 456, Par. 102, this language:

"Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercises the corp-

orate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs. Within the scope of its powers, it is supreme, and its acts are the acts of the county. While acts outside their statutory powers are without validity, yet, within the limits of the jurisdiction conferred on them by law, county boards have a wide, or at least a reasonable, discretion; and courts will not interfere with such boards in the lawful exercise of such jurisdiction, on the sole ground that their actions are characterized by lack of wisdom or sound discretion, it being permissible for equity to interfere only in cases of fraud or a clear abuse of discretion. The county board cannot exercise its constitutional jurisdiction within the territorial limits of another county, nor can it justify its failure to perform a statutory duty, on the ground that obedience to the law is not necessary."

A county court is a political subdivision of the State of Missouri and as such is a corporation which may sue and be sued.

CONCLUSION

The statutes creating a county school textbook commission imposes a mandatory duty on the county court to appoint the member of this commission. The terms of the statute leave nothing to the discretion of the court and its duty with respect to this commission is imposed by statute. As a court it shall perform certain acts. Because these acts are manda-

Hon. J. M. Wilson

-5-

10-11-43

tory they may be enforced by mandamus proceedings in our courts.

Respectfully submitted,

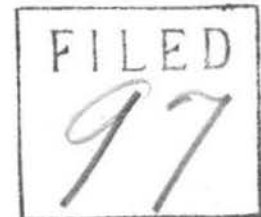
J. I. MORRIS
Assistant Attorney-General

LIM:CP

APPROVED:

ROY McKITTRICK
Attorney-General

DELINQUENT CHILDREN: 1) Section 9703, R. S. Mo. 1939, construed concerning judge's authority to tax costs. Against whom.
2) When costs are to be paid by the County Court pursuant to Sec. 9703, R.S.Mo. 1939, Circuit Clk. shall follow same procedure in the collection thereof as used in the collection of criminal costs.
October 29, 1943



Honorable Max R. Wiley
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Sir:

We are in receipt of your opinion request of October 26, which request reads as follows:

"I am requesting an opinion from your office in regard to costs in Juvenile Court. I find that Section 9703 Revised Statutes of Missouri 1939 provides that costs may be assessed against the petitioner, prosecuting witness or others interested in the case. It further provides that if the costs are not collected from these sources that they may be collected from the county.

"I am asking your office for an opinion as to whether a regular cost bill made out by the Circuit Clerk and approved by the Circuit Judge and Prosecuting Attorney should not be paid by the County Court when properly made out and presented to them.

"I do not think that it is fair for the costs to be assessed against the petitioner or others. Juvenile Delinquency is on the increase in the country districts as well as the cities and they should be taken care of, but you cannot expect officers not on a salary to assist in investigations and other duties preparatory to bringing the juveniles into court."

We presume that in this request you intend to ask two questions mainly:

1) Does the judge in a proceeding held in accordance with Section 9703, R. S. Mo. 1939, have a right to adjudge the costs against the county or must he in every case adjudge the costs against

some individual, petitioner or otherwise.

2) What sections of the Statutes govern the method of collecting costs if the county is obligated to pay.

First in considering question one, we quote the pertinent part of Section 9703, Supra, controlling this opinion which reads as follows:

"* * *The hearings may be conducted in the judge's chambers or in such other room or apartment as may be provided for such cases, and as far as practicable such cases shall not be heard in conjunction with the other business of the court. The cost of the proceedings may in the discretion of the court be adjudged against the petitioner, or any person or persons summoned or appearing, as the case may be, and collected, as provided by law. All costs not so collected shall be paid by the county. * * *"

It will be noted from the reading of the aforesaid portion of said section that it is provided:

"* * *The cost of the proceedings may in the discretion of the court be adjudged against the petitioner, or any person or persons summoned or appearing, * * *"

In 25 R.C.L. at page 768, we find this general principle of authority construction laid down:

"The word 'may' must be understood to have been used in a permissive sense where it is expressly coupled with the word 'discretion' in such a way as to negative the possibility of its use in a mandatory sense."

(Valentine's Law Dictionary, p. 804.)

Therefore, we must conclude that the legislature intended when they used the words "may in the discretion of the courts" that the trial judge if he saw fit could adjudge that the petitioner or any person or persons summoned or appearing in the hearing before him should pay the costs of such

hearing. We shall next consider what provision is made in the section in a situation where the trial judge did not in his discretion adjudge the costs. Turning to the section we find this sentence:

"All costs not so collected shall be paid by the county."

It is significant to note that the sentence starts "all costs" and further, there is contained in the sentence the word "shall" whereas in the first quoted part of the section which we have just referred to, the legislature used the words "may in the discretion of the courts". Turning to the definition of the word "shall" we quote from the Case of State ex rel. McKittrick, Attorney-General vs. Wymore, 119 S. W. (2d), page 941, l.c. 944, paragraph 7:

"* * *On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and word 'shall' is mandatory.* * *"

From the reading of the case supra; together with the definition quoted from 25 R. C. L. Supra, we must conclude that the legislature intended that both the word "may" and the word "shall" should be given their usual and ordinary meaning. Therefore, it is our view that if a trial judge adjudges that the costs shall be paid by the petitioner or any person or persons summoned or appearing at the hearing and such costs so adjudged cannot be collected from such persons, then such costs or the part that cannot be collected shall be paid by the county for as pointed out heretofore, the statutes makes a provision that:

"All costs not so collected shall be paid by the county."

Further, it is our view that if the trial judge in his discretion determines that the costs should be borne by the county in the first instance, then he has authority in his discretion to so adjudge the costs.

Now directing our attention to question number two, it will be noted from the reading of Article 10, Chapter 56, R. S. Mo. 1939, that there is not provided a statutory procedure for the collection of costs which a county is obligated to pay arising out of a hearing under the provisions of Section 9703 contained in said article and chapter. Therefore, we must conclude that the legislature intended that in such cases the costs should be collected in the same manner as costs are collected growing out of a court proceeding where the county is liable for the costs. Therefore, when we review other statutes for a plan of collection, our attention is drawn to Article 20, Chapter 30, R. S. Mo. 1939, which article sets up a plan for the collection of costs in criminal cases and which procedure is used nearly daily by the Circuit Clerk and for this reason we deem it sufficient to merely refer to Article 20, Chapter 30, as the correct procedure for the collection of said costs and do not deem it necessary to quote in length from the several sections contained therein.

CONCLUSION

1) The costs in a hearing held pursuant to Section 9703, R. S. Mo. 1939, may be adjudged by the trial judge to be paid by the petitioner or other person or persons appearing at said hearing. If for any reason the costs cannot be collected from such person then said costs shall be paid by the county.

OR

The trial judge may adjudge that the costs be paid by the county in which said proceedings are held.

2) The proper statutory procedure applicable for the collection of costs where the same are to be paid by the county is fully detailed in Article 20, Chapter 30, R. S. Mo. 1939.

Respectfully submitted,

B. Richards Creech
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

BRC:ir

PURCHASING AGENT:

PERMANENT SEAT OF GOVERNMENT:

Commissioner of Permanent Seat
of Government has authority to
hire labor to paint interior of
State Capitol.

December 9, 1943



Mr. R. W. Winn, Commissioner
Permanent Seat of Government
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an official opinion, under date of November 18, 1943,
which reads as follows:

"At a meeting of the Board of the
Permanent Seat of Government on
Monday, November 15, 1943, the matter
of painting the interior of the State
Capitol Building was taken up by the
Board, and after considerable discus-
sion the Board directed the Commissioner
of the Permanent Seat of Government,
Robert W. Winn, to request an opinion
from the Attorney General's Office as to
whether or not labor for the painting of
the inside of the Capitol Building must
be employed through the Purchasing Agent,
or whether the Board would be within its
rights in hiring a reputable painter by
the hour to do the said painting on the
inside of the State Capitol Building.

"I am, therefore, making a request of you
for the aforesaid opinion."

One of the cardinal rules of statutory construction
is to determine the intention of the Legislature in enact-
ing said provision and, if possible, to give it that con-
struction and meaning. In *City of St. Louis v. Pope*, 126
S. W. (2d) 1201, 1. c. 1210, the court said:

"In the Senter Commission Company Case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W. 2d 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * * * * this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.' * * * * *"

In the State Purchasing Agent Act, it provides in Section 14590, R. S. Mo. 1939, that the State Purchasing Agent shall purchase all supplies for all departments of the State, except printing, binding and paper, as provided in Chapter 115, R. S. Mo. 1929. Section 14590 reads:

"The purchasing agent shall purchase all supplies except printing, binding and paper, as provided for in chapter 120, R. S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

Another exception to the above statutory provision is Section 14593, R. S. Mo. 1939, which provides that under certain conditions such purchases of a technical nature, or, for emergency orders, may be purchased by the various departments under procedure prescribed by the Purchasing Agent. Said section reads:

"The purchasing agent shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best

be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the purchasing agent together with all bids received and prices paid."

Under Section 14599, R. S. Mo. 1939, of the same Act, the term "supplies" used therein is defined and is broad enough to cover paints which might be necessary for use in painting the interior of the State Capitol. Said section reads:

"The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state."

I think it will be conceded by all concerned that labor cannot possibly come within any of the provisions hereinabove referred to, unless it might possibly come under the words "contractual services." You will note that Section 14599, supra, also provides that supplies shall include "contractual services," which shall include telephone, telegraph, postal, electric light and power service, and water, towel and soap service. However, nowhere in the Act do we find any specific provision which in any manner of imagination authorizes the State Purchasing Agent to hire labor for the decoration of the Capitol Building.

By using the general words "contractual services," followed by more specific words, we are of the opinion that the Legislature intended to not only include such contractual services as were specifically mentioned, but others of a similar nature and kind, but did not intend to include a general contract to paint the Capitol or repair same. 59 Corpus Juris, page 980, Section 580, in part reads:

"* * * So words of general import in a statute are limited by words of restricted import immediately following and relating to the same subject.
* * * * *

In view of the foregoing provisions of the State Purchasing Agent Act there can be no question but that the Purchasing Agent is the proper, authorized person to purchase paints and other necessary supplies to be used in painting the interior of the State Capitol Building, unless such purchase comes within the hereinabove specific provisions. However, we think this would not be true if a contract should be let on a turnkey basis whereby the contractor furnished all necessary supplies and labor and made one charge for all work and labor.

Section 10265, R. S. Mo. 1939, creates a board of permanent seat of government and provides that said board shall have general supervision and charge of the public property of the State at the seat of government, and reads:

"There is hereby created a board to be known as the Board of Permanent Seat of Government, to consist of the governor, secretary of state, state auditor, state treasurer and attorney-general, which shall have general supervision and charge of the public property of the state at the seat of government. This board shall have power to appoint a commissioner of the permanent seat of government, who shall hold his office, at the pleasure of the board, and shall receive twenty-five hundred dollars per

annum which shall be in full for all services rendered the state. Said commissioner shall in all things where he is in this chapter given charge or control, hold such power subject to the direction of the board of permanent seat of government."

Section 10272, R. S. Mo. 1939, further authorizes the Commissioner of the Permanent Seat of Government to contract for and superintend the repairs and construction of any public buildings or improvements that may be required by law at the seat of government, when no other person or official is directed to do the same. Said section reads:

"He shall contract for and superintend the repairs and construction of any public buildings or improvements that may be required, by law, at the seat of government, when no other person or officer is directed to do the same."

We also find that Section 10267, R. S. Mo. 1939, requires the Commission of the Permanent Seat of Government to preserve all State property.

Section 10269, R. S. Mo. 1939, further vests in the Commissioner of the Permanent Seat of Government charge of the Capitol, and provides that he shall take care of same and see that it is not injured and is kept in repair, and further that he shall keep same in good condition, and reads:

"He shall have charge and control of the capitol, and shall take care that the same be not injured or get out of repair. He shall keep the rooms not occupied, and all other places, clean and in good condition. Rooms not in use shall be locked. He shall place all the furniture and articles belong-

ing to the state, and not used about the capitol, in some secure part of the building, and shall keep the keys of the same. He shall take care that no combustible matter be brought into or accumulate in or about the capitol, and shall use all precautions against accidents from fire or other causes."

Section 10285, R. S. Mo. 1939, requires the Board of Permanent Seat of Government to hire sufficient watchmen to preserve the peace and order in the buildings over which it has charge and control.

In the foregoing statutes vesting certain powers in the Board of Permanent Seat of Government and the Commissioner, we find in many instances the following words have been used: "general supervision" and "charge and control."

General supervision was construed in Aull v. City of Lexington, 18 Mo. 401. In that case the court was required to construe an ordinance giving the board of aldermen of said city general supervision of the health of said city. In construing the words "general supervision" the court held that such provision should be construed to grant active, efficient power to reach whatever may be necessary to the preservation of public health. And, further, that such power should not be limited to purely advisory measures and that the board, under such authority of the ordinance, may even rent a building to be used as a hospital to protect the city from infection of cholera. In so holding the court, at l. c. 402, 403, said:

"The power of 'general supervision over the health of the city' is very indefinite, and when it is found to be the principal power conferred upon a board of health, it is evident that the council of the city designed to comprehend more than a mere authority to examine into the condition of the health of the city, and advise the measures necessary for its preservation. * * * * *

"In construing this ordinance, we must suppose that it was intended to confer useful powers upon the board, and that the general terms of the grant were employed for the purpose of making the powers as extensive as the necessities and dangers of the community appeared to require. When, then, the necessity existed for a house to be used as an hospital, as has been found in the present case, we think it must have been within the contemplation of the ordinance that the board should exercise the power of renting such house."

Also, in Great Northern Railway Co. v. Snohomish Co., 93 Pac. 924, the court, in defining general supervision given to the State Board of Tax Commissioners over county boards of equalization and taxable property, held that the Commissioners did not merely act in an advisory capacity, but had also power to classify inter county railroads and fix the value thereon for purposes of taxation.

In State v. Erhr, 204 N. W. 867, the court held that to have control over a place is to have authority to manage, direct, superintend, restrict and regulate it. In so holding the court said:

"In general, to have 'control' of a place is to have the authority to manage, direct, superintend, restrict, or regulate."

CONCLUSION

Therefore, in view of the foregoing statutory authority and decisions, especially Section 10272, supra, which

provides that the Permanent Seat of Government shall contract for and superintend the repair and construction of any public buildings and improvements that may be required by law at the permanent seat of government, it is the opinion of this department that the Commissioner of the Board of Permanent Seat of Government is the proper authorized person to contract for labor to paint the interior of the State Capitol; that if said paint is to be purchased and, unless it comes within the exceptions contained in Section 14593, supra, or a contract is entered into wherein the Board of Permanent Seat of Government through its Commissioner, hires a contractor for a turnkey job, the Purchasing Agent is the authorized person to purchase said paint.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

ARH:CP

APPROVED:

ROY McKITTRICK
Attorney-General

OFFICERS: Failure to qualify authorizes
JUSTICE OF THE PEACE: predecessor to continue in office.

January 22, 1943

Honorable Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri



Dear Mr. Woolsey:

Under date of January 13, 1943, you wrote this office requesting an opinion as follows:

"The above mentioned Section provides that each township shall be entitled to two Justices of the Peace and an additional Justice if the township shall contain an incorporated town with a population of 2000.00, etc. The same Section provides that Justices of the Peace shall be elected for a term of four years and until their successors are elected and qualified. We are confronted with this situation here in Boonville Township, Cooper County.

"Four years ago P. M. Floyd and B. L. Moore were elected and qualified, Charles Kendall was elected at the same time, but resigned to accept another position. John Stegner was afterward appointed to succeed Kendall. Stegner was subsequently inducted into the Army and Frank Smith was appointed to succeed him. At the last November election B. L. Moore, L. I. Shuck and L. L. Williamson were elected. Moore and Shuck have qualified, but Williamson did not, and, of course, cannot at this late hour. Frank Smith delivered all of his papers and docket to Shuck who is carrying on in place of Smith.

"Query: Is Floyd still authorized to function? He has no qualified successor. I take the position that his commission granted four years

January 22, 1943

ago authorizes him to function until the next
election * * * * *

Later, in response to our inquiry you informed us that all of the persons mentioned in your letter were residents of Boonville, which is a city over two thousand inhabitants and less than one hundred thousand inhabitants. This information eliminates one question which might have been injected into the problem.

In answering your question, attention is first directed to Section 5, Article XIV of the Constitution of Missouri:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Mention is made in your letter of Section 2522 R. S. Mo., 1939, and the following excerpt is taken from this Section:

" * * * * * but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; * * *
* * * * *

Section 2525 provides for the election and term of office of justices of the peace and is as follows:

"Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

Section 2533 requires the person elected to the office of justice of the peace to take an oath of office, and Section 2534 provides that a person elected to such office who fails to record the certificate of election and oath of office within thirty days shall be deemed to have refused to accept such office.

The rule seems to be well established in Missouri that the failure to select a successor to an office does not terminate the tenure of office of the person originally selected except where the law indicates the intention to terminate the term at a definite and fixed time. The first expression of this nature is found in *State vs. Lusk*, 18 Mo. 333. Other cases in which the rule is announced and followed are *State ex inf. Hulen vs. Brown*, 274 S. W. 985 and *Langston vs. Howell County*, 79 S. W. (2d) 99.

The case of *Knight Brothers vs. Mersman*, 86 Mo. 219, was a case involving the office of justice of the peace of St. Louis, and the following quotation is taken from this case at l.c. 221:

"Appellant insists that his motion to dismiss the suit should have been sustained. In support of this contention it is claimed that the act of April 23, 1891, relating to the election of justices of the peace, repealed by substitution sec-

tion 6094, Revised Statutes, 1889, on the same subject. If this be conceded, still the conclusion contended for by defendant, that the offices and functions of prior justices ceased upon election under the latter act, does not follow. It is expressly said in the constitution: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.' This is an affirmative grant of tenure of office, failing resignation, to the time of qualification of the successor of the officeholder. The only limitation to the term thus provided for by the constitution is that a contrary provision shall not have been made by statute. The act of April 23, 1891, does not in terms, nor by necessary implication, cut off the tenure of the predecessors of the justices elected under the latter act prior to the qualification of the newly elected justices. * * * * *

In the earlier case of State of Missouri to the use of Jacob Liechter et al., v. Miller et al., 48 Mo. 251, where a question was raised as to the validity of an act of the justice of the peace after the expiration of his commission, the Court spoke in the following manner at l.c. 253:

"It would seem from the indications of the record that Wells' official term as a justice of the peace had expired prior to the issue of the execution. On that ground it seems to be regarded by the defendants as wholly invalid. It appeared, however, that Wells continued to act officially notwithstanding the expiration of his commission, and that he was acting as a justice at the time the exe-

cution was issued. Having been in office, his continued acts colore officii within the jurisdiction of a justice de jure were valid as to third parties, and cannot be collaterally drawn in question. * * * * *

Another case dealing with the justice of the peace is State ex rel. Walker vs. Powles, 136 Mo. 376, which was a quo warranto proceeding in which a judgment of ouster was issued against respondent. The Court in discussing the tenure of office of a justice of the peace used the following language at l.c. 381:

"The term of the office to which he was appointed extended only to the general election in 1890, and by the terms of his commission, and under the law, could extend no longer than to the qualification of his successor elected at such election and duly commissioned in pursuance thereof. As has been seen, the term of office of justices of the peace in this state is four years. They are elected quadrennially at the general election for county officers and have been so elected ever since 1882. The first general election for county officers and justices of the peace occurring after the appointment of the respondent, by the county court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification the term of the respondent would have ceased. But it seems that no successor was chosen at that election, and as the respondent, under his appointment by the county court, was authorized to hold and exercise the functions of said office not only until the next general election of county officers, but until his 'successor was elected, commissioned and qualified,' he thereafter continued lawfully the incumbent of said office and authorized to exercise the functions thereof until a successor for him should be chosen at the

next general election for county officers, and justices of the peace in November, 1894. State ex rel. v. Ranson, 73 Mo. 78."

Taking the facts from your letter, P. M. Floyd was elected justice of the peace four years ago and, under the statutes, would hold his office for the term of four years and until his successor was lawfully chosen and qualified. At the same time Floyd was elected two other persons were elected: B. L. Moore and Charles Kendall. Moore served his four year term and was re-elected and would, therefore, succeed himself. Kendall did not serve his term but was succeeded by Stegner who was succeeded by Smith. At the last election L. I. Shuck and L. L. Williamson were elected justices of the peace along with Moore. Shuck had qualified and Smith delivered to him his docket and all papers pertaining to the office and Shuck is now filling the office held by Smith. This leaves Williamson to be the successor of Floyd. Williamson failed to qualify.

The constitutional provision and the statutes before referred to contain nothing that would directly or by implication terminate the tenure of office of a justice of the peace until his successor is lawfully chosen and qualified. The quotations included support this view.

CONCLUSION

It is, therefore, the conclusion that, under your statement of facts, Floyd, the justice of the peace

Hon. Thomas G. Woolsey

-7-

January 22, 1943

for whom no successor has qualified, retains the office
and is entitled to perform the duties of the office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

SHERIFF'S
FEES:

Not entitled to charge fee unless service
is rendered.

January 23, 1943

Honorable Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Mr. Woolsey:

Under date of January 13, 1943, you wrote
this office requesting an opinion as follows:

"Section 13411 contains a schedule of fees allowed Sheriffs for certain duties. The practice has been in this County, I am told, that the Sheriff shall collect three dollars as a part of the cost in misdemeanors instituted by the Highway Patrolmen. These officers are on salaries and are not authorized to collect fees, etc.

"In a case where the Sheriff does not make the arrest, does not know the circumstances, but who is called upon to take charge of the prisoner in the event he is put in Jail, collect the costs and fine and keep a record of same for his report to this office and to the County Treasurer, just what fees and how much cost is he entitled to receive? I am informed that your office gave an opinion holding that the Sheriff was entitled to a fee of \$3.00, the same as though he were present and made the arrest, served the warrant and appeared as a witness. Please give me the benefit of your interpretation to this section of the law."

A search of the opinion file has been made for

January 23, 1943

any opinion stating a sheriff would be entitled to a fee of three dollars in a situation similar to the one detailed in your letter and no such opinion has been found.

Your letter mentions Section 13411 R. S. Mo., 1939. The fees permitted to be charged by sheriffs in criminal cases are set out in Section 13413 R. S. Mo., 1939. The first clause of this section is as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows: * * * *"

You will observe the quoted portion above states that sheriffs shall be allowed for their "service". The noun "service" is defined in Webster's International Dictionary as follows:

* * * * *

"2. Performance of labor for the benefit of another, or at another's command; attendance of an inferior, hired helper, slave, etc.

In silence did him serve as a squire.

Tennyson.

* * * * *

"4. The deed of one who serves; labor performed for another; duty done or required; office.

The last piece of service I did for . . .
. King Charles. Dryden. * * * *

The plural of this word is used in Section 13413.

The sheriff is only authorized to make a charge for some act performed. It follows, if he performs no act or service he is not entitled to charge or collect any fee.

The following excerpts from Section 13413, supra, are set out for your guidance:

" * * * * *

"For serving and returning each capias, for
each defendant. \$1.00

" * * * * *

"For committing any person to jail. 1.00
* * * * *

Under the provisions of Section 13414 the sheriff is authorized to collect mileage for travel serving process more than five miles from the place of holding court. In the situation mentioned in your letter where the sheriff merely takes charge of the prisoner after he has been found guilty, places him in jail, collects the costs in fine he would be entitled to the fee allowed for committing the person to jail any mileage that might be necessarily traveled and ten per cent of the costs collected. A portion of Section 13413, supra, is as follows:

" * * * * * The clerk shall tax all the costs in the case against such defendant and deliver a certified copy of the same to the sheriff, who shall immediately proceed to collect such costs from the defendant, together with ten per cent on the amount of costs, so collected, as a commission for collecting the same, and the clerk shall receive of such commission an amount equal

Hon. Thomas G. Woolsey

-4-

January 23, 1943

to ten per cent of the fees collected and due such clerk, and the remainder of such commission shall be retained by the sheriff: * * * "

Your attention is invited to Section 4232 R. S. Mo., 1939, which prohibits the collection of witness' fees by an officer unless the officer testifies some point five miles or more distant from his place of residence.

It would be impossible to prepare a fixed statement of costs that would be applicable to each case as in every case fees which could be lawfully charged and collected would be different.

In addition to the foregoing there is enclosed herewith a copy of an opinion written June 6, 1939, by Lawrence L. Bradley, assistant Attorney-General, to Honorable A. A. Bayles, Sheriff of St. Francois County, which treats of the fees a constable may charge and your attention is particularly called to the fourth section of the opinion. It is believed conclusion there announced is also applicable to your question.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS

MUNICIPAL CORPORATIONS: City of the third class liable for court costs, except in certain instances.

February 3, 1943.



Mr. Charles H. Woods
Clerk of the Circuit Court
Butler County
Poplar Bluff, Missouri

Dear Mr. Woods:

The Attorney-General wishes to acknowledge receipt of your letter of January 29, 1943, in which you request an opinion of this office on two different questions. One of these questions has been answered by furnishing you an opinion written at a earlier date by an Assistant in this office. This leaves only one question to be taken up in this opinion and that is on the following matter:

"Is a city of the 3rd class liable for court costs?"

The general statute in the State of Missouri relative to the liability for costs incurred in the courts of this State, is Section 1406, Revised Statutes of Missouri for 1939, which provides as follows:

"In all civil actions or proceedings of any kind the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

We have searched the statutes relative to cities of the third class and we find no statutes or provisions in such statutes which provides that a municipal corporation is exempt from the payment of costs incurred in actions in the courts of this State in which it is a party. The statutes and decisions of this State confer the right of cities and municipal corporations to bring actions in the courts and also provides

that they may be sued in certain instances. This will appear to destroy the sovereignty of such municipal corporations and they fall under the provision of Section 1406 which we have cited above. However, in cases wherein a city of the third class is endeavoring to enforce ordinances under its police regulations, a different rule applies in this State.

In the case of *City of Greenfield v. Farmer*, 190 S. W. 406, 195 Mo. App. 209, it was held that where a city was attempting to enforce one of the ordinances of the city, which was a city of the fourth class, and the decision in such case was against the city, that the costs could not be taxed against such municipal corporation. The court said in that case the following:

"In addition to the reason that we have been unable to find any statute authorizing the taxation of costs, in a proceeding like this, against a city of the fourth class, we think it would be manifestly wrong to hold the city for attempting to enforce its ordinances in its police regulation; the city is thereby acting in its governmental capacity or on its governing side, and if it were to be mulct in costs in cases where the proceedings are against individuals for the violation of its ordinances, it might, because of its limited powers to raise revenue, become a bankrupt in attempting to police the city, or, on the other hand, would be slow to enforce municipal regulations for fear of becoming liable for the costs."

It appears that the same reasoning and ruling applies to cities of the third class as do to cities of the fourth class in this particular type of action. Therefore, it appears that in civil actions the prevailing party should recover costs regardless of whether or not there is a municipal corporation involved, but that in actions for the enforcement of police regulations and criminal regulations under the

Feb. 3, 1943

ordinances of the city, that the costs shall not be taxed against such city.

Conclusion.

Therefore, it is the opinion of this Department that cities of the third class are governed by the provisions of Section 1406, R. S. Mo. 1939, with relation to costs in lawsuits in which they are involved, except in those cases where there is an attempt by such city to enforce an ordinance under the police regulations of such city. In that case, under the ruling set out in City of Greenfield v. Farmer, supra, the costs in such case shall not be taxed against the city.

Yours very truly,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

(SUPPLEMENTAL OPINION)

ELECTIONS: Election clerks in the Constitutional Convention delegate election selected by the judges of such election.

March 11, 1943.

3/15



Hon. Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Mr. Woolsey:

This will acknowledge receipt of your letter of March 9, 1943, in which you request an opinion of this Department. This opinion request, omitting caption and signature, is as follows:

"As per my agreement by phone this morning I respectfully request an interpretation of Section 11504 R. S. Mo. 1939, for this reason:

"If the election judges, one Democrat and one Republican are authorized to name and select the clerks to officiate at the impending Constitutional Election, I believe that it will invite no end of dissatisfaction; whereas if the County Court can be permitted to name the clerks the elections may be had with infinitely less trouble or dissatisfaction.

"Please give me the benefit of your interpretation of this Section at your earliest convenience."

In order for us to arrive at a conclusion on the matter as to who is to select the clerks for the impending Constitutional Convention election, we will first cite you to Section 11685, R. S. Mo. 1939, which reads in part as follows:

"Whenever an election shall be called to elect delegates to a constitutional convention or an election called for the purpose of ratifying a submitted new Constitution, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions were submitted at a general election; except, that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and the next highest number of votes for governor at the last general election; * * * * *

On reading this section of the statute it will be observed that the Constitutional Convention delegate election "shall be conducted in the manner provided by law for general elections." Under such a provision it is necessary for us to inspect the statutes relating to the conduct of general elections in the State of Missouri. Therefore, we wish to call your attention to Section 11504, R. S. Mo. 1939, which provides as follows:

"In all precincts casting less than two hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting two hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment, shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be

March 11, 1943

administered at the same time and
in the same manner heretofore directed."

This section clearly indicates that in all precincts casting less than two hundred votes, the judges shall appoint two clerks, and in all precincts casting two hundred or more votes, the judges shall appoint four clerks. Section 11503, R. S. Mo. 1939, is entitled "Oath of Judges of Election," and such section sets out the oath that the judges of election shall take before entering upon their duties. Section 11504, supra, immediately follows this section and there can be no doubt that when the word "judges" is used in such section that it refers to the "judges of election." This could not refer to the judges of the county court.

We have examined all statutes which might pertain to this matter and we find no statute which deals with the selection of clerks of the election aforesaid except the statutes cited above. Therefore, it is the opinion of this Department that the clerks of the election for the selection of delegates to the Constitutional Convention shall be appointed by the judges of their respective precincts as provided by Sections 11683 and 11504, R. S. Mo. 1939.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

GUARDIANS: Parents of minor children under fourteen years of age may waive their rights as natural guardians, and a guardian of the person and estates of such children may be appointed by the Probate Court.

April 26, 1943.



Miss Hope Wray
3rd Officer, WAAC
Army Recruiting Station
Post Office Building
Cape Girardeau, Missouri

Dear Miss Wray:

The Attorney-General wishes to acknowledge receipt of your letter of April 23, 1943, requesting an opinion of this Department. Your letter reads as follows:

"A problem has come up in the WAAC on which I would like your opinion.

"One of the qualifications for joining the Womens Army Auxiliary Corps is that if a girl has a child under the age of 14, she must give legal custody of the child to someone else. We are wondering if there is a distinction between legal custody and adoption. Most girls do not want to let someone else adopt their child, but they are willing to give the custody of the child while they are in the Corps or for the period of the duration of the war plus not to exceed six months.

"In order to swear the girl into the Corps we must have a court order showing that legal custody of the child has been granted to someone else. Would it be possible to obtain a court order giving legal custody for an indefinite period of time?

April 26, 1943

"Any information you are able to give us on the above would be greatly appreciated by this office, and you will be doing the recruiting service a great favor."

We interpret your inquiry as a request for this Department to suggest or recommend some manner in which the problem set out in your letter may be met. Under the statutes applicable to probate matters in this State, the parents are the natural guardians of their minor children and without any court proceeding or other action whatever they have legal custody over the person of such children and also have control of the estates, if any, of these children. Such relationship is provided for in Section 375, Revised Statutes of Missouri for 1939, which prescribes the following:

"In all cases not otherwise provided for by law, the father and mother, with equal powers, rights and duties, while living, and in case of the death of either parent, the survivor, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian and curator of their children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the parents acting as guardian and curator, such parents shall give security and account as other guardians and curators, and if such parents shall refuse or neglect to give such bond the probate court, or judge in vacation, shall appoint some competent person as curator to take charge of and manage such property. The parents of such minor child or children acting as such natural guardian and curator shall be entitled to receive and collect the earnings of such minors, until they reach their majority, and be liable for their support to the extent of such earnings: Provided, that this law shall not be so construed as to exempt the father of such minors from liability for the support of his children."

There are other statutes in this State which provide for the appointment of guardians for minors under the age of fourteen years, where it is shown that such child's parents or parent is incompetent or unfit for the duties of guardianship. Such procedure is specified in Section 378, R. S. Mo. 1939, which provides as follows:

"If a minor have no parent living, or the parents be adjudged incompetent or unfit for the duties of guardianship, the probate court, or judge or clerk thereof in vacation, subject to the confirmation or rejection of said court of the county of the minor's domicile, or if the minor have no domicile in this state, then the probate court, or judge thereof in vacation, of the county where the minor may at the time be actually residing, shall appoint guardians to such minors under the age of fourteen years, and admit those above that age to choose guardians for themselves, subject to the approval of the court at its next term thereafter. Unfitness or incompetency of parents, after ten days' notice to the parents, shall be decided in the probate court by the judge thereof, or by a jury, if one be demanded."

As can be seen from this section of the statute, the machinery is set up for the appointment of a guardian for minors in certain instances, but we feel that the status of "natural guardian" on the part of the parents of minors is a "right or privilege." In other words, they not only have the right or privilege to act as the natural guardians of their minor children, but we think they further have the right or privilege to waive such relationship, if they so desire. This construction of the law is borne out by a statement found in 28 Corpus Juris, page 1065, Section 22, which is as follows:

"A general guardian cannot be appointed for an infant whose natural protector is living, unless such natural protector consent to such appointment."

Should our position be correct, and if the parents waive their right to act as natural guardians, the Probate Court then has the power and authority to appoint a guardian for the minor children. It is apparent, we think, that Section 378, cited supra, should apply where the parent or parents of the minors contend they should remain as natural guardians but through their unfitness or incompetency are not capable of so acting. Following such reasoning, it is our opinion that parents may waive their right or privilege to act as the natural guardian of their minor children.

If the applicants for your branch of service are required to waive their natural right of guardianship over their children under the age of fourteen, then it appears to us that they probably will also be compelled to waive any rights to control the estate, and education of such children. Therefore, the procedure as outlined in Section 393, R. S. No. 1939, must be followed. This section and also the succeeding Section 394, provide the following:

(393)

"Every appointment of a guardian or curator shall specify whether it be of the person of his ward or of his estate, or of his person and estate; and a copy of the order of such appointment, duly certified under the seal of the probate court, shall be prima facie evidence of the facts therein stated in all courts of law in this state."

(394)

"The guardian of the person, whether natural or legal, shall be entitled to the charge, custody and control of the person of his ward, and the care of his education, support and maintenance; the curator shall have the care and management of the estate of the minor, subject to the superintending control of the court; and the guardian of the person and estate of the minor shall have all the powers and perform all the duties both of a guardian of the person and a curator."

Consequently, if a parent waives the right to act as natural guardian and the Probate Court contemplates and intends to appoint a guardian for any children of such parent, then when application for guardianship is requested, it should be specified that guardianship of the "person and of the estate" of the minor is desired. Thus, the guardian appointed is then placed in the same position as was the parent or natural guardian.

Referring again to Section 378, R. S. Mo. 1939, supra, we find that the Probate Court has authority to appoint a guardian in certain instances. We also feel that such court has power to appoint such guardian where the parents waive their right as natural guardians. Section 397, R. S. Mo. 1939, speaks of an applicant for appointment as guardian and what such applicant must do. As we have said before, the statutes, in our opinion, are meant to apply where the parent or parents are contesting their removal as natural guardians. However, since our theory is that parents have the right to waive their natural right of guardianship, it necessarily follows that if such is done, the appointment must conform to the statutes referring to the removal by the parents for cause. Therefore, if an applicant for entrance to the WAAC appears in court and waives her right as natural guardian of her children under the age of fourteen, there are two ways in which to proceed. The court on its own volition may then appoint a guardian or there may be filed an application similar to the one referred to in Section 377, R. S. Mo. 1939, cited above. When the order is made by the Probate Court, which is a court of record, the legal custody of the person and also control of the estate is then vested in the guardian appointed by the court. Thus, the parent, and in this case your applicant, is no longer vested with the legal custody of her children.

There is a provision, the same being Section 437, R. S. Mo. 1939, which provides that the public administrators in the various counties shall be ex officio "public guardians," but only in the sense that they shall have control over the estates of minors, under order of the Probate Court. This obviously will not allow the public guardian to act in this instance, since he does not have custody of the person. Therefore, it is necessary that some other person be appointed.

April 26, 1943

It might be well to mention the fact that minor children over the age of fourteen years have the privilege of choosing their own guardian, subject to the approval of the Probate Court. However, in the case of your applicants, your requirements only have reference to minors under fourteen and thus this provision is of no consequence.

Conclusion

Therefore, it is the opinion of this Department that the parents or parent of minor children under the age of fourteen, may waive their right to act as the natural guardian thereof and the Probate Court may appoint a guardian of the person and the estate of such minor that has the same powers relative thereto as the parents or natural guardian.

It is further the opinion of this Department that, at least in this particular instance, the waiver should be in the form of a written pleading or affidavit in the Probate Court, setting out the waiver and the reasons therefor.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG

PROSECUTING ATTORNEY: May maintain the office anywhere.

April 27, 1943



Honorable A. L. Wright
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

We are in receipt of your opinion request dated
April 19, 1943, which reads:

"I would appreciate your opinion on
the following:

"Before election to this office I
had for several years practice law
at Crane in this county and still
maintain an office there and reside
there. Crane is in the north end
of the county and due to geography
and the road system those people in
the north half of the county who wish
to see me would have to come through
Crane to get to Galena. More than
half of the people live in the north
end of the county. In order to save
miles to those who wish to see me, which
just now are precious, I have announced
that I will be in Galena on Mondays,
Wednesdays and Fridays and the other
days at my office in Crane. I have
arrangements with the Sheriff to call
me at any time I am needed and if
needed in Galena on the days I should
be in the Crane office I answer his
call.

"It has been my opinion that under the
statute I did not have to maintain an

April 27, 1943

office at all in the court house unless I wanted to do so. The statute does not say so. Am I in your opinion failing to take care of the duties of my office because I am not keeping my office in Galena everyday, but attending to duties as above stated."

In answer to your question this office must advise you that we have been unable to find any authority which requires a prosecuting attorney to maintain the office of prosecuting attorney at any particular place. It has been the general practice of prosecuting attorneys in small counties to maintain a private office at the place of his residence at the same time that he served as prosecuting attorney. The only requirement of a prosecuting attorney is that he devote his personal attention to the duties of the office. Section 18, Article II, Constitution of Missouri provides:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

Also, discussing the general duties of an officer of the State is Section 12942, R. S. Missouri 1939. Neither the Constitution nor the statutes indicate where a prosecuting attorney must maintain that office. The criterion, apparently, is whether or not he is devoting enough personal attention to the office to fulfill the duties thereof.

Section 12927, R. S. Missouri 1939, provides that a prosecuting attorney devote his entire time to the duties of the office in cities of more than 100,000 population. It might be argued from this that since the legislature expressly ruled on the amount of time a prosecuting attorney should devote to the duties of prosecuting attorney in cities of one size, the legislature must have realized that in cities (or counties) of lesser population the office of prosecuting attorney did not require the attorneys' full time.

April 27, 1943

Therefore, in smaller cities (or counties) the prosecuting attorney could devote the amount of time necessary to discharge the duties of the office, and need not devote his entire time to the office if such effort was not required. If that is true it does not seem to be inconsistent that he may maintain two offices, the office of prosecuting attorney and his own office. Needless to say, the office of prosecuting attorney is the primary office, and the duties of that office should never be subordinated to the attorney's private office.

CONCLUSION

A prosecuting attorney may maintain the office of prosecuting attorney at the county seat or elsewhere and a private office at the place of his residence, even if in different parts of the county, as long as the duties of the office of prosecuting attorney are considered as primary duties and receive enough of the office holder's time and attention to discharge the duties of the office of prosecuting attorney effectively.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WCB:EAW

SHERIFFS: No fee unless expressly authorized by statute.

May 7, 1943



Honorable Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

We are in receipt of your letter of May 6, 1943, in which you request an official opinion. Your letter reads in part:

"For many years the Cooper County Court has allowed the Sheriff \$3.00 per day for calling the Board of Equalization to session. I know of no provision of the statutes to authorize such an allowance in counties such as Cooper where township organization is not in force."

Your question specifically concerns the "calling" of the Board of Equalization by the sheriff and the allowance to him of a fee for said service.

Section 4342, R. S. Missouri 1939, provides a penalty for the exaction of fees to which an officer is not entitled. Said section provides:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

May 7, 1943

We have been unable to find any section of the statutes or any constitutional authority for the allowance of the fee to the sheriff for simply "calling" the Board of Equalization into session. In the case of Smith v. Pettis County, 136 S. W. (2d) 282, 1. c. 285, the court in discussing the right of a public official to compensation for the performance of any duty, said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup. 129 S. W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * * * *

Under this case, and the Nodaway County case cited therein, the rule is made plain.

CONCLUSION

The sheriff is entitled to no fee for any act he performs unless such compensation is expressly provided for by statute. In answer to your request it is the opinion of this office that the sheriff of Cooper County is not entitled to a fee for calling the Board of Equalization into session, due to the absence of any statutory authority for such fee.

Respectfully submitted

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WCB:BAW

INSANE PERSONS: Two classes of patients, county and private.
Private patient may not be supported by
payment to county the amount it pays to
State for support as county patient.

October 6, 1943



Mr. Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department. Your letter is as follows:

"Section 9358, Revised Statutes of Missouri, 1939, defines the term 'insane poor.' Section 9328 provides for the commitment of insane poor to State institutions where they shall be maintained at the expense of the county. My attention has been called to this situation:

"In 1926 a mother of two minor children was committed to the State hospital at Fulton where she has since remained as a county patient. The sons of this woman have for many years been reimbursing the county in the sum of \$72.00 a year for the maintenance of their mother in Fulton. They are not insolvent; on the contrary, they are possessed of considerable property, and I am told that the mother also owns property in Cooper County. If this be true, then she is not an indigent insane person under the law.

"Query: Shall the County Court continue to pay the expenses of the maintenance of this woman in the State hospital and in turn be reimbursed by the sons?"

From your letter we understand that a patient was committed by the County Court of Cooper County to State Hospital No. 1 at Fulton, Missouri, as a county patient and the sons of the patient pay to Cooper County the sum of \$6.00 per month, or \$72.00 per year, which is the amount the county pays to the State Hospital for the support and maintenance of each of its insane poor as provided in Section 9328, R. S. Mo. 1939. \$6.00 is the maximum amount to be paid by the county for the support of each insane patient and is the sum now fixed by the State Eleemosynary Board for such support.

There are two classes of patients that may be sent to the State hospitals of Missouri, namely, pay patients, and county patients.

Pay patients are defined by Section 9322, R. S. Mo. 1939, as follows:

"Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this article and the by-laws of the hospital prescribed and regulated."

Such patients, sometimes called private patients, shall only be admitted upon the payment of at least ninety days' charge in advance and a sufficient bond to secure the payment of charges incurred in behalf and on account of said patient, and necessary clothing shall be furnished in addition thereto. The amount of the advance payment and the required bond is prescribed by rules and regulations of the Board of Managers of the State Eleemosynary Institutions within the limits of the statutes, Sections 9323 to 9327, inclusive, R. S. Mo. 1939.

County patients are those of the insane poor, or indigent insane, who have the other necessary qualifications to be admitted to the State hospital, who have not sufficient estate to support them at the State hospital for the insane. Section 9328, R. S. Mo. 1939, et seq.

We do not find that there are any other classes of insane persons who may be sent to State hospitals. The patient is

either a private patient or a county patient. There is no provision in the law for a part county patient and a part pay patient.

So far as we are able to find there is no statutory authority for the county to permit a patient to be sent as a county patient and then by some other arrangement allow someone else to reimburse the county for the amount paid to the State hospital for the keep of the patient.

Prior to the re-enactment of Section 8636, R. S. Mo. 1929, by the Laws of Missouri 1935, page 387, the maximum amount paid by the county for the support and maintenance of their insane poor was \$18.00 per month. Under the present statute, Section 9328, R. S. Mo. 1939, the maximum amount paid by the county is \$6.00 per month for each patient. It will, therefore, be seen that the burden of caring for the indigent insane by the amendment of 1935 was shifted, to the above extent, from the county to the State.

You also state in your letter that you are informed that the insane patient owns property in Cooper County, although you do not state the amount, or whether she would come within the terms of Section 9358 R. S. Mo. 1939, which might make her a pay patient. Of course, it is a question of fact to be determined by the county court whether or not a patient belongs to the class of indigent insane persons who are entitled to receive care and maintenance at a State hospital at public expense, or whether the patient is in fact a pay patient. If, upon an investigation by the proper authorities it is determined that the county patient is in truth and fact a pay patient, it is then the duty of the county court to order the transfer as provided in Section 9347, R. S. Mo. 1939, from a county patient to a pay patient.

CONCLUSION

It is, therefore, our opinion that there is no statutory authority for the county to pay \$72.00 per year to the State hospital for the support and maintenance of an insane person and then, by an outside arrangement, permit other persons to reimburse the county for the amount that the county has paid to the State and the State be required to assume the balance for the support and maintenance of the insane patient.

Respectfully submitted,

APPROVED:

ROY McKITTRICK
Attorney-General

COVELL R. HEWITT
Assistant Attorney-General

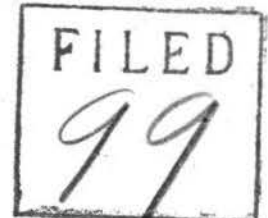
CRH:CP

COUNTY COURTS:
POOL TABLE LICENSE

County Court is not authorized to collect a license tax from a club where tables are used by members without charge.

November 16, 1943

11/24



Honorable A. L. Wright
Prosecuting Attorney of Stone County
Galena, Mo.

Dear Sir:

This is in reply to your letter of November 10, 1943, requesting for an official opinion of this office in the following words:

"A groupe of men in Galena have formed what they call a club, being only about 10 of them, have rented a club room, and among other equippmnt in the club room keep and use for their own amusement a pool table. No charge is made by the club for playing on the table by its members. The total expense of the club is of course paid by the members.

"Under Chapter 135 of R. S. 1939 can the County require them to pay a license for the keeping and use of this table?

"It does not seem to me that the county can go so far yet section 15405 seems to make only one exception.

"Let me have your opinion."

Section 15397, R. S. Mo., 1939, is as follows:

"County court to license keepers of billiard tables.--The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of

November 16, 1943

said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, hereinbefore mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court." (R. S. 1929, Sec. 14272.)

Section 15405, R. S. Mo., 1939, as amended by the Laws of Missouri, 1941, P. 519, Par. 1, is as follows:

"Exceptions--This chapter shall not apply to any person having set up in his own private residence any one of such tables mentioned in Section 15397, when used for his own private use, and for the use of his family, nor to clubs where pool, billiard and other tables are used exclusively for club members and upon which no charge for playing is made."

CONCLUSION

From the foregoing, it is the opinion of this office that private clubs that have a pool table which is used exclusively by club members, and for which there is no charge made for playing, are not subject to the license tax provided for in Chapter 135, R. S. Mo., 1939.

Respectfully submitted

GAYLORD WILKINS
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

GW:DC

SHERIFF'S
FEES.

Fees of Sheriff for commitment in
cases where defendant is sentenced
to Alcoa.

August 25, 1943

Honorable Luther Young
Circuit Clerk
Kennett, Missouri



Dear Sir:

This is in reply to yours of recent date, wherein you submit the following statement and request:

"State v. Hallett E. Hughes.

"The above named was sentenced to two (2) years confinement at Alcoa, Missouri, on his plea of Guilty for Grand Larceny.

"Among other items of costs in the Justice Court were found the Sheriff's charge for serving the enclosed process.

"Please favor us with your opinion as early as possible relative to whether this charge by the sheriff is proper. The sheriff and I will both appreciate an early reply.

"I would also like to have your opinion as to the correctness of the forms, also the State's liability to the sheriff for service on the forms enclosed."

With your request you enclosed two commitments ; one used by a Justice of the Peace when a defendant is brought before him, who is unable to furnish bond to appear at a preliminary hearing; the other used when the defendant is bound over to Circuit Court and is unable to give bond for appearance in such Circuit Court.

In your request you inquire as to the sufficiency of the form of these commitments. We think they are sufficient as to form.

Aug. 25, 1943

As to the authority to pay the Sheriff for services on these commitments, we find the rule to be that such fees are purely statutory and the officer must be able to put his finger on the statute authorizing such payment. Under Sec. 13413, R. S. 1939, the sheriff is entitled to a fee of \$1.00 for committing a person to jail.

On the question of whether the sheriff would be authorized to charge the commitment fee on the commitment when the defendant is committed, because he is unable to give bond to appear at the preliminary, we think the case of Thomas v. St. Louis, 61 Mo. 547, is in point. In that case the court said l. c. 548:

"The appellant, being county marshal of St. Louis County, and as such entitled to the same fees as are allowed to sheriffs in like cases, contends that when any person is arrested by him under a capias, and in default of bail is imprisoned by him in the county jail, to await examination by the proper magistrate, he thereby becomes entitled not only to the fees allowed for serving and returning the capias, but also to the fee of one dollar provided by the statute for committing any person to jail.

"We do not think so. It is the duty of a sheriff acting under a capias to arrest and safely keep the person therein named, and to have the body of such person when and where he shall be commanded by such writ; and the statute makes it the duty of all jailors to receive from the sheriff or other officers all persons who shall be apprehended by them for offences against this State. When a prisoner is arrested under a capias, he is held thereunder until he has been either bailed, committed or discharged; and until such prisoner is either bailed, committed or discharged, any imprisonment

of him in the county jail is at the discretion and for the protection of the officer executing the writ, as well as to secure the body of such prisoner, and is not a committing of such person to jail, within the meaning of the statute; and for the safe-keeping of any person in his custody undergoing an examination preparatory to commitment, he is entitled to a per diem allowance, where the number of days such person is so held exceeds one. (Wagn. Stat., 626, Sec. 14.)

"The words 'committing any person to jail,' relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

This holding is followed with approval in State ex rel. v. Clark, 170 Mo. 76, and in State ex rel. Million v. Allen, Auditor, 187 Mo. 561, 564, the Court said:

"*** A commitment means a judicial order, and until such an order is made the person arrested is the sheriff's prisoner by virtue of the capias. (Thomas v. County of St. Louis, 61 Mo. 547.) After an order of commitment has been made by the court, the sheriff or jailer is only entitled to a sum not exceeding fifty cents a day for the board of the prisoner.***"

However, the cases cited above did not take in to consideration the statute which is now Sec. 3864 R. S. 1939, which is as follows:

"A magistrate may adjourn an examination of a prisoner pending before himself, from time to time, as occasion requires, not exceeding ten days at one time, and to the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause

shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance for such further examination, and not to depart without leave of said court, and for want of such recognition he shall be committed."

By this section it seems that the Justice may issue a commitment where the examination is pending, in case the defendant cannot give bond.

We think the examination is pending from the time the defendant is arrested until the examination is disposed of by the Justice. So the officer would in such case be entitled to the fee for the commitment issued under this section. Then, if the defendant is bound over at the preliminary, Sec. 3877, R. S. Mo., 1939, applies. It is as follows:

"If the offense be not bailable, or sufficient bail be not offered, the prisoner shall be committed to the jail of the county in which the same is to be tried, there to remain until he be discharged by due course of law."

By these provisions of the statute it seems that two commitments may be issued in a case where a person is arrested and bound over to Circuit Court on a felony charge.

C O N C L U S I O N

From the foregoing, it is the opinion of this department that the sheriff is entitled to a fee for serving two

Honorable Luther Young

-5-

August 25, 1943

commitments where both are issued in a case when defendant is charged with a felony; the first commitment being issued under Sec. 3864, R. S. Mo., 1939, and the second being issued under Sec. 3877, R. S. Mo. 1939, supra.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

TWB:LeC